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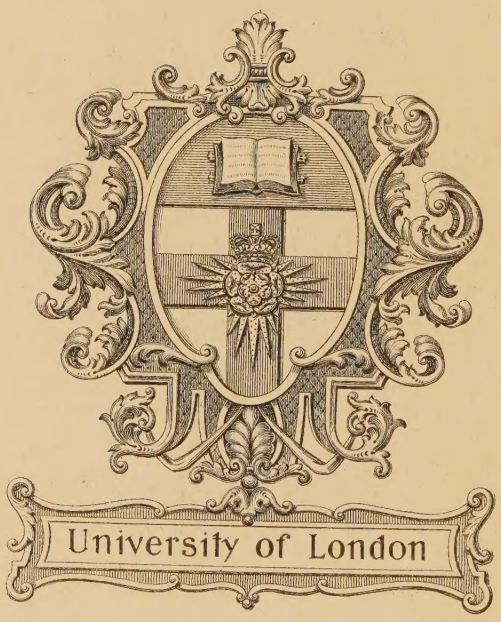

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LAWSON *v.* FINANCIAL NEWS, LIMITED.

C. A. 1917 Oct. 22.

[1917 L. 838.]

Practice—Appeal—Time for setting down—Production of Order to proper Officer of Court a Condition Precedent to Entry—Interlocutory Appeal—Rule of Convenience—Entry on Books of Court one clear Day before Appearance in Printed Cause List—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 8.

An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation, before the next day on which the Court is sitting, otherwise the respondent will be entitled to have the motion dismissed as an abandoned motion although the notice of appeal was given.

Statement of the practice of entering appeals in the Annual Practice, 1918, p. 1097, corrected.

Statement in judgment of James L.J. in *In re National Funds Assurance Co.* (1876) 4 Ch. D. 305, 306, explained.

It is a condition precedent to the setting down of an appeal under r. 8 of Order LVIII. that the party seeking to set it down should produce to the proper officer of the Court of Appeal the order appealed from or an office copy thereof, and, therefore, the practice of setting down an appeal with a note "Produce order" is irregular and shall be abandoned in the future.

As a rule of convenience the Court of Appeal requires that, in the case of interlocutory appeals, the appeal shall have been entered upon the books of the Court for one clear day before it appears in the daily cause list for hearing.

APPEAL from a decision of Eve J.

The action was brought by the plaintiffs, who were shareholders in the defendant company, against the defendant company and its

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directors, claiming by their writ an injunction to restrain the defendants from issuing any of the first debenture stock of the defendant company, series B, to any directors or members of the staff in respect of arrears of directors' fees or salaries alleged by the defendants to be due to the directors or members of the staff for the years 1914, 1915, 1916, 1917, or in respect of any part of such arrears of directors' fees or salaries. On July 27, 1917, the plaintiffs moved before Eve J. for an interlocutory injunction in the terms of the writ, and an order for an injunction was granted. Notice of appeal from this order was given by the defendants on August 1 for August 7, and served on August 1. August 7, the date for which the notice was given, being in vacation, the defendants did not attempt to set down the appeal until October 11. On that day the clerk to the defendants' solicitors attended for the purpose of setting down the appeal, but was unable to produce the order appealed from, which was in the possession of the plaintiffs. The notice of appeal was then accepted and entered by the officer of the Court of Appeal, who indorsed on the præcipe "Produce order." The order was produced by the clerk on the following day, October 12.

Gore-Browne, K.C., and *F. Whinney*, for the appellants.

Maugham, K.C., and *H. E. Wright*, for the respondents. We take the preliminary objection that the appeal is out of time. The order appealed from was made on July 27, 1917. Notice of appeal was given on August 1 for August 7 but was not entered until October 11. The practice for the entry of appeals is stated in the Annual Practice for 1918, at p. 1097, in a note to r. 8 of Order LVIII. The appeal must be entered before the day mentioned in the notice of appeal for the hearing, or if such day falls in a vacation when the office is closed, then on the next day when the office is open. The office is open all through the vacation except on Bank Holidays and Sundays. The appeal ought therefore to have been entered before the day for which the notice of appeal was given: *In re National Funds Assurance Co.* (1); *In re Mansel.* (2)

[WARRINGTON L.J. There is no object in forcing a man to set down an appeal in a vacation merely because the office happens to be open. The statement in the Annual Practice is wrong. It does not

(1) 4 Ch. D. 305. (2) (1878) 7 Ch. D. 711.

represent what James L.J. said in *In re National Funds Assurance Co.* (1), much less what the other two Lords Justices said.]

On October 11, when the appeal was entered, the order was not produced as required by r. 8 of Order LVIII. (2) It was, however, produced on the following day, October 12, and, therefore, technically the appeal was not entered until that day, which was too late.

Gore-Browne, K.C., and *F. Whinney*. It is submitted that r. 8 of Order LVIII. has been complied with. As the time for which the notice was given expired in the vacation it was sufficient that the appeal should be set down at any time before the day on which the Court first sat. The judgment of James L.J. in *In re National Funds Assurance Co.* (3) is inaccurately reported. The words "when the office is closed" should be "when the Courts are closed." The penalty only attaches if the appeal is not set down before the Court sits. Here the appeal was set down on October 11 and the order produced on October 12.

[SCRUTTON L.J. According to r. 8 the officer was wrong in setting down the appeal before the order was produced.]

The appeal was in fact set down on October 11 and the production of the order related back to that date, and the appeal was therefore in time. We ask the Court to hear the appeal.

SWINFEN EADY L.J. An objection is taken to this appeal that it is out of time. We have to determine that objection, and to consider whether the appeal is in time or out of time. The appeal is from an interlocutory order of Eve J. of July 27. Notice of appeal was given on August 1 for August 7. The appeal was not then set down; but it was brought to be set down on October 11. The clerk on that day was unable to comply with Order LVIII., r. 8, because he

(1) 4 Ch. D. 305.

(2) Order LVIII., r. 8: "The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

(3) 4 Ch. D. 306.

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could not produce to the proper officer the order appealed from or an office copy of it. The officer pointed that out, and on the præcipe there is a note " Produce order." On the following day, October 12, which was the first day on which the Court actually sat, the order was produced ; and on the præcipe the note is altered and instead of the words " Produce order," the word " Produce " is struck out, and the note runs " Order produced on the 12th October."

The question is was that notice of appeal in time ? Order LVIII., r. 8, provides : [His Lordship read the rule and continued :] This appeal was not set down so as to be effective for hearing on October 12, and was therefore clearly out of time. It was urged that the practice as to the time for entering an appeal was correctly stated in the Annual Practice, 1918, at p. 1097, in a note to r. 8, under the heading " Time for entry " : " An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or, if such day falls in a vacation *when the office is closed*, then on the next day on which the office is open." That note is based on a decision of the Court of Appeal in *In re National Funds Assurance Co.* (1), which laid down the rule of practice, but the note does not state correctly the decision of the Court. Baggallay J.A. said (2) : " I am disposed to think that the true construction of rule 8 is that the appeal must be set down before the day named in the notice of motion for the hearing of the appeal, or, if the day named is in a vacation, before the next day on which the Court is sitting." He said nothing about the office being closed. Brett J.A. said (3) : " The appeal must be set down before the day named in the notice of appeal, or, if the day named is in a vacation, before the next day on which the Court is sitting." In those two judgments the practice is quite clearly stated, and no one can misapprehend it. The language used by James L.J. is this (4) : " The notice of the appeal is to be taken to the officer of the Court of Appeal, and he is to enter the appeal. It appears to me that unless this is done before the day named in the notice for the hearing of the motion, or, if the day named fall in a vacation when the office is closed, before the next day on which the Court is sitting, the appeal cannot be placed in the paper for hearing." I think there is a

(1) 4 Ch. D. 305.
(2) 4 Ch. D. 307.
(3) 4 Ch. D. 308.
(4) 4 Ch. D. 306.

clerical slip in the report of that judgment and that the word "office" should be "Court." "When the office is closed" means "when the Court is not sitting." The whole context shows that is the meaning. He says: "unless this is done before the day named in the notice for the hearing of the motion"; and compare "or . . . . before the next day on which the Court is sitting." Put in that light, it brings the statement into accord with the two other judgments of Baggallay J.A. and Brett J.A. In other words, the rule is that the appeal must be set down before the day named in the notice of appeal in the ordinary way; but if the day named is in a vacation, when the Court is not sitting, then before the next day on which the Court is sitting—not on the next day. A party is not entitled to wait until the next day when the Court is sitting before entering an appeal, so that it is necessarily excluded from that list, but must enter it before the day on which the Court is sitting. Therefore the last day for setting down an appeal is the day next before the day on which the Court is sitting; and that is the practice laid down by that case, and, as was there said, the ancient practice in Chancery with regard to appeals.

Then it was said that the appeal was set down in time with a query upon the præcipe "Produce order." In my opinion such a procedure is not a compliance with the rule. I am aware that a practice of this kind has arisen. No one can shut one's eyes to the fact that the printed cause lists contain appeals set down with the words "Produce order" against them. That practice is irregular and should be abandoned. It is not in accordance with r. 8 of Order LVIII. That rule, which I have already read, provides that the order or an office copy thereof should be produced and a copy of the notice of motion left, and that thereupon the officer is to set down the appeal. In my judgment the officer is not in future to set down any appeal unless this rule is complied with—that is, unless at the time the notice of appeal is brought to him there is also brought with it the order appealed from, or an office copy thereof.

Then there is a further point. The practice of this Court has been that an interlocutory appeal shall not be put into the daily cause list for hearing until it has been on the books of the Court for one clear day. That is a convenient practice, and will be adhered to in the future. It will not shorten the time of appealing; it will

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not affect it. If an appeal is duly set down, either on the day before the day named in the notice of motion, or if in a vacation, on the day next before the day on which the Court sits, that will be a compliance with the rule, and the parties will have set down their appeals in time; but as a matter of convenience this Court gives a direction to its officer not to insert in the daily cause list for hearing any interlocutory appeal that has not been for one clear day on the books. At the present time it is essential that that rule should be adhered to. There is a difficulty in parties coming from a distance to London, and also in communicating; and representations have been made to us within the last few days asking that the daily cause list may be definitely settled at 2 o'clock in the day instead of waiting till 4; and, of course, it would be quite impracticable to deal differently with cases set down before 1.30 and cases set down after 1.30. The practice will therefore be, as it has been in the past, that no interlocutory appeal will actually appear in the paper for hearing until it has been set down and has remained on the books for one clear day.

The result, therefore, is that this appeal is out of time. The practice is now definitely settled. The practice of setting down an appeal and marking it "Produce order" will be abandoned as quite irregular; and no interlocutory appeal will appear in our list for hearing until the expiration of one clear day from the setting down.

WARRINGTON L.J. I am of the same opinion, and should add nothing on my own account but for the fact that we are expressing our disagreement with a statement of the practice which appears in the Annual Practice for the current year, and has, as I understand, appeared in the Annual Practice for a good many years past. The objection is taken that this appeal was not entered in time, and, therefore, is liable to be dismissed as an abandoned motion. Order LVIII., r. 8, provides: [His Lordship read the rule and continued:] That rule does not specify any time before or within which the appeal must be set down. That omission was supplied by the decision of the Court of Appeal in *In re National Funds Assurance Co.* (1) in the year 1875, very soon after the Judicature Act came into operation. The rule laid down by that case is thus stated in the Annual Practice,

(1) 4 Ch. D. 305.

1918, at p. 1097: "An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or, if such day falls in a vacation, *when the office is closed*, then on the next day on which the office is open." When one looks at the case one finds that two of the Lords Justices, Baggallay J.A. and Brett J.A., made no reference at all to the closing of the office. I will read Baggallay J.A.'s statement of the rule of practice(1): "The true construction of rule 8 is that the appeal must be set down before the day named in the notice of motion for the hearing of the appeal, or, if the day named is in a vacation, before the next day on which the Court is sitting." Brett J.A. expressed his opinion in substantially the same terms. It will be observed so far that if those two judgments expressed the view of the Court of Appeal the note in the Annual Practice is inaccurate in two respects —first, that it inserts after the word "vacation" the words "when the office is closed," which do not appear in either of those two judgments; and, secondly, that it inserts the words "then on the next day on which the office is open." In neither of those judgments do the latter words appear, but the words "before the next day on which the Court is sitting," which are very different. The words "when the office is closed" are taken from the judgment as reported of James L.J. James L.J. said (2): "It appears to me that unless this is done before the day named in the notice for the hearing of the motion, or, if the day named fall in a vacation when the office is closed, before the next day on which the Court is sitting, the appeal cannot be placed in the paper for hearing." In my opinion, if that judgment is carefully read, it is clear from the context that the words "when the office is closed" are either a slip on the part of the reporter, or on the part of the learned judge himself, for "when the Court is closed"; for the Lord Justice goes on immediately to say "before the next day on which the Court is sitting." The important point is that the appeal should be set down before the day next before that on which the Court will be sitting, and therefore the day on which the appeal might be heard.

In the present case the order was made on July 27. Notice of appeal was given on August 1 in the vacation for August 7, and steps were taken to set it down on October 11, but it was not set down on

(1) 4 Ch. D. 307. (2) 4 Ch. D. 306.

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that day. An essential preliminary to setting down an appeal is the production of the order appealed from. It is on the production of that order that the proper officer is to set down the appeal. Although, therefore, the appeal was entered in the books with a note "Produce order" it was not in fact, according to Order LVIII., r. 8, set down on October 11. The order was not produced until October 12, and it was not until that day, therefore, that the appeal was effectively entered. In my opinion, on that ground, the appeal was entered too late.

It is, as has been pointed out, notorious that the officer of the Court of Appeal has been in the habit of setting down appeals although the order has not been produced, and of entering them in the daily cause list with a note "Produce order." In my opinion that is an irregular practice and one which tends to encourage delay in the drawing up of orders. It is therefore a practice which, in my opinion, ought not to prevail in the future, and must be abandoned.

As to the rule of convenience which Swinfen Eady L.J. has laid down, I have nothing to add, except to say that I agree with him.

SCRUTTON L.J. In view of the warning given by the report of *In re National Funds Assurance Co.* (1) against three members of the Court of Appeal stating a rule in three different sets of words, I propose to add nothing except that I agree.

The preliminary objection was accordingly allowed; special leave to set down the appeal was subsequently granted and the appeal stood over to complete the evidence.

On November 5, 1917, the appeal came on to be heard and was dismissed with costs.

Solicitors: *Slaughter & May; Ashurst, Morris, Crisp & Co.*

(1) 4 Ch. D. 305.

W. I. C.

S. J. & E. FELLOWS, LIMITED *v.* CORKER.

NEVILLE J.

1917

Oct. 16, 17.

[1917 F. 1205.]

Company—Managing Director's Remuneration—Commission on "net profits"—Excess Profits Duty—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 45.

By a pre-war agreement of service between a company and its managing director a fixed annual salary was to be paid to him and also a commission of 25 per cent. on the net profits of the company, and in order to arrive at the net profits for the purposes of the agreement certain charges and items were to be deducted and others were not to be deducted from the gross profits of the company in each year. The company earned large profits for the years 1915 and 1916 in respect of which excess profits duty became payable:—

Held, that the excess profits duty was not to be deducted from the profits of the company before calculating the managing director's commission.

The principle for arriving at the profits of a company laid down by Buckley J. in *Attorney-General* v. *Ashton Gas Co.* [1904] 2 Ch. 621 applied.

Collins v. *Sedgwick* [1917] 1 Ch. 179 and *In re Condran* [1917] 1 Ch. 639 discussed.

The plaintiff company was formed in 1895 and carried on the business of hollow-ware manufacturers and ironfounders at Wolverhampton, and the defendant was their managing director. By an agreement of service dated June 10, 1914, and made between the defendant of the one part and the company of the other part, the defendant agreed to serve the company in the capacity of managing director of their business for a period of ten years from March 31, 1913; and (clause 5) the company agreed to pay to him as remuneration for such service a salary of 600*l.* per annum, and also to pay him "a commission of 25 per cent. on the net profits of the business," such remuneration to be in addition to any directors' fees which might be received by him under the articles of association of the company. Clause 5 then proceeded as follows:—

"The amount of net profits for the purpose of this agreement on which commission shall be payable shall be arrived at in manner following, that is to say.

"From the gross profits earned by the company in each year

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shall be deducted in addition to the usual trade expenses and charges

" 1. A sum for depreciation at the rate of $2\frac{1}{2}$ per cent. on the value of lands and buildings, 5 per cent. on the value of plant and machinery, and $7\frac{1}{2}$ per cent. on the value of dies and tools.

" For the purpose of this clause it is agreed that the values of the lands, buildings, plant, machinery, dies and tools shall be taken as follows "—then followed details of values.

" 2. Such sum as shall actually be expended in repairs and renewals of buildings, plant, machinery, dies and tools.

" 3. Such a sum as shall be written off for displacement of buildings and plant," with a proviso that displacements of an extraordinary character were to be spread over a term of years.

" 4. A sum of 2000*l.* being the amount necessary to pay a dividend of 8 per cent. on the recent share capital of the company or such other amounts as shall be necessary to pay such dividend on the ordinary share capital of the company for the time being ranking for dividend without deduction of income tax.

" 5. The amount paid for directors' fees up to but not exceeding 300*l.* per annum.

" 6. Any interest on loans or bank overdrafts.

" No deduction shall be taken in respect of

" (*a*) Any bonus paid to directors or any directors' fees in excess of 300*l.* per annum.

" (*b*) Life insurance premiums on the life of the said W. H. Corker.

" (*c*) Income tax on profits under Schedules A. and D.

" (*d*) Any commission or bonus paid out of profits to any employee of the company up to but not exceeding 100*l.* per annum."

For the years ending March 31, 1915 and 1916, the company made large profits, and the amount of the excess profits duty payable by the company under the Finance Act, 1915–1916, was considerable. The question having arisen whether upon the true construction of the agreement of service of June 10, 1914, the excess profits duty ought or ought not to be deducted from the profits of the company in each year before ascertaining the " net profits " on which the defendant's commission was to be calculated, the company issued a summons to determine the matter.

The Inland Revenue authorities had allowed the deduction of the defendant's commission before arriving at the amount of profits on which excess profits duty and income tax were payable by the company.

Butcher, K.C., and *J. M. Gover*, for the company. The excess profits duty was first imposed by s. 38 of the Finance (No. 2) Act, 1915, and was 50 per cent., and has since been increased by the Finance Acts of 1916 and 1917. It is a debt payable by the company to the Crown, which we contend the company is entitled to deduct from the profits before arriving at the "net profits" on which the defendant's commission is to be calculated. The articles of the company show that the debts of the company must be paid before a dividend is paid to the shareholders. We rely on *Collins* v. *Sedgwick* (1) and *In re Condran* (2), both decided by Peterson J., in which he held that this excess profits duty is not analogous to income tax and must be deducted before arriving at profits available for distribution as dividend, and pointed out that income tax is part of the profits paid by the company on behalf of the shareholders which a shareholder may recover, but that excess profits duty is a charge on the profits and a debt payable by the company to the Crown. *Johnston* v. *Chestergate Hat Manufacturing Co.* (3) and *William Hollins & Co.* v. *Paget* (4) will be cited against us, but they are decisions on income tax and are distinguishable on that ground. Further, the excess profits duty was not in existence when the parties executed this agreement, and it is submitted that it is a debt and necessary outgoing of the business within the meaning of the agreement which must be deducted before calculating the defendant's commission. [They also referred to ss. 35, 38, 40–49 of the Finance (No. 2) Act, 1915, and ss. 45, 48, 49 of the Finance Act, 1916.]

Jenkins, K.C., and *Dighton Pollock*, for the defendant. There is an analogy between income tax and excess profits duty. A comparison of the language of the sections imposing the income tax in the Income Tax Act, 1842, with the sections imposing the excess profits duty in the Finance (No. 2) Act, 1915, shows that there is no

(1) [1917] 1 Ch. 179, 183.
(2) [1917] 1 Ch. 639, 644.
(3) [1915] 2 Ch. 338.
(4) [1917] 1 Ch. 187.

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material difference between the two statutes. This agreement does not deal with the profits payable as dividends to the shareholders but with the commission on the profits payable to an individual, and the question is what are the " profits " in the meaning of the agreement ? In *Attorney-General* v. *Ashton Gas Co.* (1) Buckley J. says : " The profits are not arrived at after deducting income tax. The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." His judgment was approved in the Court of Appeal and in the House of Lords (2), and was followed in *Johnston* v. *Chestergate Hat Manufacturing Co.* (3) and *William Hollins & Co.* v. *Paget.* (4) The decision of Rowlatt J. in *Thomas* v. *Hamlyn & Co.* (5) is also in our favour. The excess profits duty is essentially a charge on profits.

[They were stopped.]

Butcher, K.C., in reply.

NEVILLE J. The question I have to determine is the construction of an agreement made on June 10, 1914, between a company and their managing director. It provides for his remuneration by the payment to him, amongst other things, of a 25 per cent. commission on the net profits of the company. The agreement provides that " The amount of net profits for the purpose of this agreement on which commission shall be payable shall be arrived at in manner following, that is to say, From the gross profits earned by the company in each year shall be deducted in addition to the usual trade expenses and charges " certain specified amounts, including a sum of 2000*l.* for the purpose of providing an 8 per cent. dividend for the shareholders ; and that no deduction is to be made in respect of certain matters, including income tax on profits under Scheds. A and D. I may say at once that income tax under Scheds. A and D does not help the matter, because undoubtedly,

(1) [1904] 2 Ch. 621, 624.
(2) [1904] 2 Ch. 626 ; [1906] A. C. 10.
(3) [1915] 2 Ch. 338.
(4) [1917] 1 Ch. 187.
(5) [1917] 1 K. B. 527.

whatever this excess profits duty may be, it is not a tax on profits under Scheds. A and D. Therefore I am driven back to find out what are the " net profits " referred to in this agreement apart from the special deductions and non-deductions which are specified, and I am confronted with this at once, that it is no use seeking to find in the words of the agreement any intention of the parties with regard to the particular matter in hand, because undoubtedly, when they entered into the agreement, the idea of excess profits duty was utterly beyond their anticipation. I must, therefore, find out what is the real meaning of the words " net profits " used in an agreement of this kind.

On that subject there is a good deal of authority to which I have been referred; and on one matter, which in the view that I take of the case does not seem to me to be of great importance, there has been a difference of judicial opinion. The first case is *Attorney-General* v. *Ashton Gas Co.* (1) There it was decided that, where by a special Act it was provided that the profits divisible by the gas company in any year among the ordinary shareholders should not exceed a given rate—which was 10 per cent.—what was really meant was 10 per cent. subject to income tax and not 10 per cent. free from income tax. The matter came before Buckley J., he so decided, and his decision was affirmed by the Court of Appeal and upheld in the House of Lords. The important thing there is the ground on which it was held that income tax was not to be deducted before ascertaining the amount of the dividend, and Buckley J. says (2): " The argument addressed to me has been that, inasmuch as under the machinery of the Income Tax Acts the corporation is assessed under Schedule A, and pays income tax upon all its profits, the corporation has nothing out of which it can pay the corporator dividend beyond the balance which remains after the corporation has paid the income tax payable by the corporation; and that out of this fund it is entitled to give the shareholder not exceeding, say, 10 per cent. This argument, I think, rests upon a fallacy. The profits are not arrived at after deducting income tax. The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be

(1) [1904] 2 Ch. 621. (2) [1904] 2 Ch. 623.

NEVILLE J. 1917 S. J. & E. FELLOWS v. CORKER.

deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." That view of the learned judge was repeated by the judges in the Court of Appeal, and was, I think, the substantial ground upon which the decision rested. The next case is *Johnston* v. *Chestergate Hat Manufacturing Co.* (1), which was similar to this in this respect, that it was a question of what should be deducted from the annual profits of the company before ascertaining the net profits upon which a percentage should be paid to a manager, and Sargant J. held that the income tax was part of the net profits available for dividends and that the percentage must be calculated upon the net profits without any deduction of the tax. He referred to the judgment of Buckley J. in the previous case and quoted the passage to which I have already referred. Then comes the case of *Collins* v. *Sedgwick* (2), before Peterson J. There the purchase price of the ordinary shares of a company was to be a " fixed value " which was to be determined in manner defined by the articles, being based upon a three years' aggregate of the sums which would have been paid as dividend upon such ordinary shares " if in respect of each of such three years there had been distributed among the members the entire profits of such year available for distribution as dividend." The learned judge held that, in ascertaining the fixed value of a share, excess profits duty payable under the Finance (No. 2) Act, 1915, must be deducted before the entire profits of any year available for distribution as dividend among the shareholders could be ascertained. It may be said that the decision turned in fact upon " the profits available for distribution as dividend " because profits paid away under the Act imposing excess profits duty upon the profits of trade could not be included as " available for distribution among the shareholders " inasmuch as it was a part of the profits that had to be paid to some one else. But Peterson J. goes into the question of whether there is an analogy between income tax and excess profits duty, and refers to the cases I have already mentioned and distinguishes them. The next case is *William Hollins & Co.* v. *Paget* (3), decided by Eve J., and it may be observed that it is the first case which in a sense may

(1) [1915] 2 Ch. 338. (2) [1917] 1 Ch. 179.
(3) [1917] 1 Ch. 187.

be said to be really in point, if one can say that the decision upon one agreement is ever a decision in point with regard to another not expressed in the same terms. It was an agreement by which a company remunerated its manager by a fixed salary and a commission payable on profits after a sum had been provided for payment of certain dividends to the various classes of shareholders, and the learned judge held that the excess profits duty was a contribution to the Exchequer of a proportion of the company's profits standing on much the same footing as the income tax, and ought not to be deducted before ascertaining the excess profits on which the manager's commission was to be calculated. On the same day a somewhat similar case came before Rowlatt J. in the case of *Thomas* v. *Hamlyn & Co.* (1) There the plaintiff was engaged as manager of four of the numerous branches of the defendants' business, his remuneration being a commission of 15 per cent. of the net profits of those four branches treated as a whole. In computing the net profits of the four branches for the purpose of ascertaining the sum due to the plaintiff for commission the defendants claimed to deduct a proportionate amount of the excess profits duty payable in respect of the profits of their business. The learned judge held that the excess profits duty could not be deducted, and his judgment is entirely in accordance with the judgment of Eve J. with regard to the general question of the remuneration of a manager by a commission on the profits, and he holds that in such a case the profits upon which the percentage is payable are not to be ascertained by in the first instance deducting the amount of excess profits duty. But supposing that view of the law were not correct, he does also say that there was something special in the agreement in the fact that it dealt with the profits of only four branches of the business taken together and not with the profits of the whole business, and that the tax was upon the business as a whole. I am not satisfied in my own mind that any true distinction can be drawn between the case of a commission on the profits of four branches of a business and the profits with regard to the whole, so far as excess profits duty is concerned. But taking Rowlatt J.'s opinion with regard to the general principle of estimating the computation of commission on profits, it is a direct authority, as Eve J.'s is a

(1) [1917] 1 K. B. 527.

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direct authority, in favour of the view that excess profits duty cannot be deducted in estimating the amount of profits upon which a commission payable to a manager is to be calculated. The matter standing thus, the question of excess profits duty again came before Peterson J. in *In re Condran.* (1) There the agreement was that upon the sale of a business the consideration to be paid should be one equal third part of the net profits of the business in the year ending September 30, 1914, and in each succeeding year up to March 31, 1919, and it was held that "net profits" meant the profits of the year's trading which were divisible among the persons interested, and that consequently, as excess profits duty must be deducted before the profits which were divisible could be ascertained, the vendors were only entitled to one third part of the profits after excess profits duty had been deducted. Of course there is nothing in that case which has a direct bearing on the agreement which I have before me, but at the same time Peterson J. entertained the view that the analogy suggested between the case of income tax and the case of excess profits duty did not exist, and that they were so distinguishable that it did not in the least follow that because you could not deduct income tax for the purpose of ascertaining the amount on which commission was to be paid you therefore had to compute the commission upon the profits of the business without first deducting the excess profits duty. If that view is right, no doubt it is an authority for the meaning of profits in an agreement of this kind, and therefore I have carefully to consider not only Peterson J.'s decision, but what he says as to the conclusion he arrives at. It will be observed that he reads the agreement there to mean the profits of a year's trading divisible among the persons interested; and of course, where the Legislature has laid its hand upon part of the profits, you cannot say those profits are divisible among the parties interested, meaning the shareholders of the company. It would be very like the case of *Collins* v. *Sedgwick* (2) which he decided, where the words were "available for distribution as dividend." Have I in coming to a conclusion as to what "net profits" mean really to decide whether distinctions can or cannot be made between income tax and excess profits duty, or is the question really determined by the view stated by Buckley J. in

(1) [1917] 1 Ch. 639. (2) [1917] 1 Ch. 179.

Attorney-General v. *Ashton Gas Co.* (1) that in arriving at what are profits you cannot deduct payments which have to be made, not in any case, but only in case the profits themselves are made, or, to put it quite shortly, in ascertaining the profits you cannot deduct a charge upon the profits before you ascertain what the profits are? The latter is what I think is meant by the words used, and that seems to me the true test of the proposed deduction from net profits. Is it a deduction that has to be made in any case, or is it a deduction that can only be made after you have arrived at the profits? It seems to me quite clear in the present case that this excess profits duty is a deduction which only can be made after you have arrived at the net profits, and that in ascertaining net profits a charge ought not to be deducted which is a charge not generally upon the company, not a liability of the company, but a liability upon the profits when they are ascertained. I therefore think that in the present case the commission ought to be computed upon the net profits as ascertained under the agreement, and that no deduction can be made in respect of the excess profits duty.

It will be observed here that the managing director has a commission on all profits, whether they are paid to the Crown or whether they are paid to the shareholders, and therefore the rate of the remuneration paid to him by the company is no greater than it would have been if the excess profits duty had never been imposed. It is quite true that he has had an opportunity owing to the war of largely extending the business of the company, and has taken advantage of that opportunity. Treating the case as general and not as applied to this particular company, where a manager is being paid by commission on profits, I cannot see why that commission should not rise as the result of an extension of the business of the company and of an increase in the profits, although part of those profits may have to be paid to the Crown.

Before I close my judgment I would add that one never likes to arrive at a conclusion upon an agreement in a case like this where it is evident that the parties never had any intention with regard to the particular question that has arisen, which leads to absurd results.

Solicitors for both parties: *Maude & Tunnicliffe, for Dallow & Dallow, Wolverhampton.*

(1) [1904] 2 Ch. 621.

NEVILLE J.

1917

Oct. 18.

In re CEDES ELECTRIC TRACTION, LIMITED.

[0047 of 1915.]

Company—Alien Enemy Shareholders—English Creditors—Alien Enemy Creditors—Winding up by the Court—Winding up by Board of Trade Preferential Payments—Stay of Court Proceedings—Practice—Form of Order—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1.

Form of order where, after a winding up order has been made by the Court on a creditors' petition against a company registered in England but controlled by alien enemy shareholders, the Board of Trade has under s. 1 of the Trading with the Enemy Amendment Act, 1916, made an order to wind up the business of the company, the Board being substituted for the petitioning creditors in the pending petition and those proceedings being stayed until the Board of Trade order has been worked out, so that the Board may then proceed under the pending petition to obtain the final dissolution of the company.

MOTION.

In May, 1910, the above-named company was incorporated and registered in England as a private company with a nominal capital of 2000*l.*, afterwards increased to 50,000*l.*, divided into shares of 1*l.* each. The principal objects of the company were the manufacture and sale of motors and motor cars. The company was promoted by an Austrian motor company of Vienna, and the whole of its issued share capital, except two shares, was held by the Austrian company or its nominees.

In October, 1915, the company made a debenture issue to secure 4000*l.* with interest, and in January, 1916, in a debenture-holders' action, a receiver and manager of the company's business was appointed on the ground of jeopardy.

On April 18, 1916, a compulsory winding up order was made against the company on the petition of the Tudor Accumulator Company, Limited, an English judgment trade creditor, and the official receiver became the liquidator. It subsequently appeared that the debts of the unsecured English trade creditors amounted to about 5000*l.*, that an alien enemy claimed to be an unsecured creditor for 40,000*l.*, that the whole of the debenture issue was held by an alien enemy company, and that the debenture-holders' action was still pending and the receiver and manager there-

under had realized the assets of the company and had some 13,000*l.* cash in hand and was about to pass his final account. Thereupon the English creditors desired to take advantage of the provisions of the Trading with the Enemy Amendment Act, 1916, which came into operation on January 27, 1916, and under which, in the winding up by the Board of Trade of an alien enemy company, unsecured English creditors are paid in priority to unsecured alien enemy creditors. Accordingly Johnson & Phillips, Limited, English unsecured creditors, with the approval of the petitioning creditor, applied to the Court to stay the winding up by the Court with the view to obtain a winding up by the Board of Trade, and on January 23, 1917, Astbury J. made an order staying further proceedings in the winding up under the Court for six months in order that the Board of Trade might decide whether or not they would make an order under the powers conferred on them by the Trading with the Enemy Amendment Act, 1916. (1)

By an order dated May 15, 1917, the Board of Trade, in pursuance of the powers given them by the Act of 1916, ordered and required the business carried on in the United Kingdom by the company to be wound up, appointed the liquidator as controller to control and supervise the carrying out of the order and to conduct the winding up of the business, and conferred on him all necessary and usual powers for that purpose.

On October 17, 1917, Johnson & Phillips, Limited, applied to the Court, by way of renewal of their motion on which the order of January 23, 1917, was made, for an order that, after taxation and payment of the costs of the petitioning creditors and of the liquidator and of the applicants, all further proceedings under the winding up order of April 18, 1916, should be finally stayed and the liquidator discharged, with liberty to apply.

Ashton Cross, for the motion. This is a novel application, but it is submitted that the procedure is right, and the petitioning creditor approves of the application. In a winding up by the Court the debts of all unsecured creditors are admitted and paid pari passu, and in this case if the claim for 40,000*l.* is admitted it would swamp the assets and the English creditors would receive

(1) See note, p. 22, post.

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only a very small dividend, but if the winding up proceeds under the order of the Board of Trade the debenture-holders and the English creditors will be paid in full. The result, therefore, of the order asked for will be that, after payment of the taxed costs to date, the liquidator, as controller under the order of the Board of Trade, will wind up the business of the company under the provisions of s. 1 of the Act of 1916, the English creditors will be paid in full, and there will be a surplus to hand over to the custodian under the Trading with the Enemy Amendment Act, 1914, and under the liberty to apply the claim for 40,000*l.* can be dealt with hereafter.

Austen-Cartmell, for the Board of Trade. The Board support the application, but desire their views to be placed before the Court. These winding up orders by the Board under the Act of 1916 have been discussed and adjudicated upon in one or two cases by Younger J., and he has held that the business carried on in the United Kingdom alone is to be wound up under the Act and not the company generally, and that the business carried on in the United Kingdom is treated for the purposes of the Act as a concern apart which can have creditors of its own, so that the result of the Act is that the English creditors of the business directed to be wound up get preferential payment.

[NEVILLE J. This company was registered in England, and the business of the company, whatever it may be, must surely be wound up in England.]

Certainly, but under s. 1 of the Act of 1916 the Board can make an order to wind up the business of an alien enemy company carried on in the United Kingdom, and can appoint a controller and confer on him the powers of a liquidator in a voluntary winding up.

[NEVILLE J. The powers of an official liquidator in a winding up by the Court are in excess of the powers of a controller under this Act of 1916.]

That is so, but the point is this: In a winding up by the Court or in a winding up by a voluntary liquidator all creditors have to be paid pari passu, but in the winding up of a business under the Act of 1916 the go-by is altogether given to enemy debts. The English creditors are provided for and paid in priority to the enemy creditors, and if there is any surplus for enemy creditors it is paid over to the custodian.

[NEVILLE J. Suppose an English limited company is carrying on business in England and has branches in Australia and America. The controller can only deal with the English assets. It is obvious, therefore, that a winding up order by the Court is much wider in its scope because it will deal with all the assets, and in considering whether the winding up order is to be entirely superseded by another order you have to realize that you are only dealing with part of the question.]

That point is met by sub-s. 7 of s. 1 of the Act of 1916, under which, if there is also a business outside the jurisdiction to be dealt with, the Board can present a petition for the winding up of the company by the Court when the proceedings under the controller are completed.

[NEVILLE J. Why have two orders for the same purpose? Where an order for winding up a company has been properly made by the Court before the Board of Trade have made an order under the Act of 1916, why is it not the proper course to stay proceedings under the Court's winding up order until the proceedings under the controller are completed?]

I submit that is the proper course, and when the Board of Trade order is worked out then the Court can deal with the matter.

[NEVILLE J. Then let the official liquidator pay the taxed costs of the petition and of this application up to date and hand over the balance to the controller, and the stay will be pending the proceedings before the Board of Trade.]

With great respect I should like a permanent stay.

[NEVILLE J. That is what I do not propose to give you, because I do not think this is a case in which the Board of Trade ought to present a petition.]

The present petitioner could not proceed under this petition without the consent of the Board of Trade under sub-s. 7 of s. 1 of the Act of 1916.

[NEVILLE J. Why not? I do not think that sub-section covers this case.]

It will be equally convenient and answer the purpose if your Lordship would substitute the Board of Trade as the petitioners in the pending petition and simply stay the petition until further order, and when the Board of Trade order is worked out the Board can

NEVILLE J. proceed under the petition to obtain the final extinction of the company.

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NEVILLE J. I think that is reasonable, and the order can go on those lines, the Board of Trade being substituted on your application on their behalf for the petitioning creditors.

The order as finally passed and entered was as follows :—

Upon motion this day, &c., and upon hearing counsel for the respondent the official receiver and liquidator of the above-named company who is also the controller appointed by the Board of Trade in the winding up thereof ordered by the said Board on the 15th May, 1917, under the Trading with the Enemy Amendment Act, 1916, and upon reading the order to wind up the above-named company dated the 18th April, 1916, the order dated the 23rd January, 1917, staying all further proceedings under the last-mentioned order for six calendar months from the said 23rd January, 1917, or until further order, and the affidavit, &c. Let the Board of Trade on their application be substituted as petitioners in place of Tudor Accumulator Company, Limited, the petitioner herein.

This Court doth order that the undertakings given by the applicant to the Court embodied in the said order dated the 23rd January, 1917, be discharged and it is ordered that the costs properly incurred in the winding up of the above-named company down to and including this order be taxed and that such costs when taxed be paid together with the fees and expenses of the official receiver as liquidator out of the assets of the said company. And it is ordered that the costs of the applicant of the said order dated the 23rd January, 1917, and of this order including in such costs the costs of application to the Board of Trade for a winding up order under the Trading with the Enemy Amendment Act, 1916, be taxed as between solicitor and client and paid by the official receiver and liquidator out of the assets of the above-named company. And thereupon and upon such payments being made it is ordered that the remainder of the assets of the company in the hands of the official receiver as such liquidator as aforesaid be held and retained by him thenceforward as controller appointed by the Board of Trade under the said order of the 15th May, 1917, and that thereupon the official receiver as such liquidator be discharged and that all further proceedings in the winding up of the said company under the said order dated 18th April, 1916, except for the purpose of carrying this order into effect be stayed until further order. And any of the parties are at liberty to apply as they may be advised.

Solicitors : *Whale & Wates ; Solicitor to Board of Trade.*

NOTE.—Trading with the Enemy Amendment Act, 1916, s. 1: "(1.) Where it appears to the Board of Trade that the business carried

on in the United Kingdom by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of the members of that firm or company, or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—

"(*a*) prohibiting the person, firm, or company from carrying on the business, except for the purpose and subject to the conditions, if any, specified in the order; or

"(*b*) requiring the business to be wound up.

The Board of Trade may at any time revoke or vary any such order . . . .

"(2.) Where the Board of Trade make any such order they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business, and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company . . . . or those powers subject to such modifications restrictions or extensions as the Board think necessary or convenient for the purpose of giving full effect to the order . . . .

"In England and Wales an official receiver may, if the Board of Trade think fit, be appointed controller.

"(3.) The distribution of any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct:

"Provided that any sums or other property which had a state of war not existed would have been payable or transferable under this section to enemies, whether as creditors or otherwise, shall be paid or transferred to the custodian under the Trading with the Enemy Amendment Act, 1914, to be dealt with by him in like manner as money paid to him under that Act. . . . .

"(7.) Where an order under this section has been made as respects the business carried on by any person, firm, or company, no bankruptcy petition or petition for sequestration or summary sequestration against such person or firm, or petition for the winding up of such company, shall be presented, or resolution for the winding up of such company

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passed, or steps for the enforcement of the rights of any creditors of the person, firm, or company, taken, without the consent of the Board of Trade, but the Board of Trade may present a petition for the winding up of the company by the Court, and the making of an order under this section shall be a ground on which the company may be wound up by the Court."

H. L. F.

EVE J. 1917 *April* 25; *June* 15; *July* 10, 11.

In re ENGLAND'S SETTLEMENT TRUSTS. DOBB *v.* ENGLAND.

[1916 E. 410.]

Trustee—Costs—Unsuccessful Action—Co-trustee and Beneficiaries not consulted—Unreasonable and improper Conduct—Liability for Costs.

In 1915 the plaintiff, one of the two trustees of a term of 1000 years created by a marriage settlement to secure a widow's annuity, commenced an action in the King's Bench Division in the name of himself and his co-trustee to recover damages for dilapidations from the tenants of a house which formed part of the trust property. This action was commenced without the sanction or knowledge of his co-trustee, or the annuitant, or the beneficiaries under the settlement. The widow's annuity had not been paid since 1913. The claim for dilapidations was based upon a specification by a firm of surveyors and amounted to 193*l.* 18*s.* The defendants to that action, while denying liability, paid 110*l.* into Court in satisfaction of all claims. Under counsel's advice the trustee obtained estimates by builders as to the cost of doing the work in the specification, and as their estimates considerably exceeded the sum paid into Court, the trustee continued the action under counsel's advice, but without informing his co-trustee or the beneficiaries of the payment into Court. In the result the official referee before whom it was tried awarded the trustees 90*l.*, and ordered them to pay the costs of the action as from the delivery of the defence.

Upon summons by the plaintiff seeking to have provision made out of the trust property in respect of the costs of the action:—

Held, that the plaintiff had been guilty of unreasonable and improper conduct in commencing and continuing the action for dilapidations and was not entitled to costs out of the trust estate.

In re Beddoe [1893] 1 Ch. 547 followed.

By a settlement dated July 7, 1874, made on the marriage of William England with the defendant, now Mrs. Andrewes, certain hereditaments were granted and demised by William England to the trustees of the settlement for a term of 1000 years to secure

two life annuities of 200*l.* and 80*l.* to his wife. The plaintiff, Richard Barrett Dobb, and the defendant, James Bruton, were the present trustees of this settlement and of the term of 1000 years.

By his will, dated July 1, 1894, W. England left the house in which he resided, No. 7, St. James' Place, to his wife for life, and after her death to his children in equal shares. The testator died in August, 1896. By a deed of family arrangement, dated January 31, 1899, Mrs. Andrewes was to have the use and enjoyment of No. 7, St. James' Place during her life in satisfaction of the annuity of 80*l.*, and she had since resided there. The net amount of the rents received by the trustees of the term was insufficient to pay the annuity of 200*l.* in full, and certain premises comprised in the settlement had been mortgaged to raise money for the annuity. This had been paid in full down to 1913, but nothing had been paid to the annuitant since. Some of the premises were considerably out of repair, and sums had been advanced by the plaintiff for the purpose of putting them in repair. One of the houses comprised in the term of 1000 years was St. James' House, Notting Hill, held under a lease, dated December 27, 1907, by which the lessees covenanted to keep the demised premises in good and tenantable repair except repairs rendered necessary through structural defects. The lessees gave notice to determine this lease on December 25, 1914. In February, 1915, the plaintiff obtained a specification from Messrs. Chesterton & Sons, surveyors, as to the estimated cost of making good the dilapidations. This amounted to 193*l.* 18*s.* On April 14, 1915, R. B. Dobb brought an action in the name of himself and James Bruton against the tenants of St. James' House and claimed 198*l.* 18*s.* damages, being the 193*l.* 18*s.*, the estimated cost of doing the necessary work, together with 5*l.* loss of rent meanwhile; and he also claimed 7*l.* 10*s.* for occupation rent for one half the quarter following December 25, 1914, according to an alleged agreement by letter to occupy the premises for the further period. By their defence to the action the tenants, while denying liability under the covenant to repair, brought into Court 110*l.* in satisfaction of the whole of the claim. Acting on counsel's advice the plaintiff obtained three estimates from builders as to the amount required for doing the work contained in the specification, and as these all exceeded the 110*l.* by 60*l.*

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or more, he continued the action under counsel's advice. At the trial before an official referee, who, after three days' trial, awarded 90*l.* for dilapidations and the plaintiffs were ordered to pay the tenants' costs of the action after the date of the payment into Court. They were allowed 18*l.* 16*s.* 4*d.* as party and party costs down to such payment. The tenants' costs were taxed at 300*l.* 2*s.*, and the costs of the trustees amounted to 309*l.* 2*s.* 8*d.* This action in the King's Bench Division was in fact brought without the knowledge or consent of James Bruton, or of the annuitant, or of the beneficiaries, or their solicitors. Nor were they consulted during the course of the action. The plaintiff stated in an affidavit that he was the acting trustee and had been requested by Mrs. Andrewes not to trouble J. Bruton unnecessarily in relation to the trust.

An originating summons was taken out by the plaintiff, as one of the trustees of the settlement and term, and also as mortgagee under the deed of January 31, 1899, asking, inter alia, that it might be decided whether he and the defendant, James Bruton, as trustees of the settlement, or either, or which of them, were or was entitled to have provision made out of the trust properties for any and what sums in respect of the costs of the defendants in the action in the King's Bench Division, ordered to be paid by the plaintiffs in the action, or in respect of the trustee's own costs of such action. The circumstances leading up to the action in the King's Bench Division, and the further details of the conduct of the plaintiff in bringing and continuing the action, sufficiently appear from the judgment.

Clayton, K.C., and *P. Stokes*, for the plaintiff. The rule is that a trustee is entitled to his costs unless he has been guilty of conduct amounting to a breach of trust, or so unreasonable and vexatious as to amount to misconduct. No error of judgment alone will deprive him of his costs so long as it is not of so gross a character as to amount to misconduct. In the case of trustees and executors costs are a matter of contract and not of the discretion of the Court. The measure of damages in the action for breach of covenant to repair is the cost of putting the premises into repair as required by the covenant: Woodfall's Landlord and Tenant, 19th ed. c. 16,

s. 3 (*l*); *Joyner* v. *Weeks*. (1) No doubt the plaintiff made an unfortunate slip in not consulting his co-trustee before bringing the action. But the latter took little interest in the trust, and the plaintiff was the acting trustee. The law as to the costs of a trustee is laid down in *Turner* v. *Hancock* (2) and other cases, such as *In re Evans* (3), *In re Knight's Will* (4), *In re Love* (5), and *In re Jones*. (6) In the last case a clear, distinct rule is laid down by Kekewich J. that to deprive a trustee of his costs there must be fraudulent or monstrous conduct which no reasonable man would be guilty of. It cannot be said that there is anything of that character in the present case. The action was not altogether unsuccessful. The plaintiff is also mortgagee and is entitled to mortgagee's costs properly incurred in protecting the settlement. The rule as to mortgagee's costs is the same as to trustee's costs: *Heath* v. *Chinn*. (7) The plaintiff may have been guilty of an error of judgment in continuing the action after the payment into Court, but it does not amount to misconduct. He acted bona fide throughout, and under counsel's advice. His conduct was therefore reasonable.

Maugham, K.C., and *Lyttelton Chubb*, for the beneficiaries. The case is governed by *In re Beddoe*. (8) It is not within Order LXV., r. 1. These are not charges and "expenses" properly incurred. The mere bona fides of the trustee is not the test. Here the plaintiff did not consult his co-trustee, who was a man of business, or any one interested in the estate, before bringing the action in the King's Bench Division. As from the date of the payment into Court of the 110*l*. the plaintiff went on at his own risk and is not entitled to costs. He has in fact done everything wrong and has been guilty of unreasonable conduct: *Luke* v. *South Kensington Hotel. Co.* (9) The trust is a joint office. His claim as mortgagee is equally wrong: *Peers* v. *Ceeley*. (10)

Clayton, K.C., in reply.

EVE J. The applicant on this summons is one of two trustees of a term of 1000 years created by a settlement of July 7, 1874,

(1) [1891] 2 Q. B. 31.
(2) (1882) 20 Ch. D. 303.
(3) (1884) 26 Ch. D. 58.
(4) (1884) 26 Ch. D. 82.
(5) (1885) 29 Ch. D. 348.
(6) [1897] 2 Ch. 190.
(7) [1908] W. N. 120.
(8) [1893] 1 Ch. 547.
(9) (1879) 11 Ch. D. 121.
(10) (1852) 15 Beav. 209.

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and seeks to have included in the costs, charges, and expenses of the trustees, and to have raised and paid by mortgage or sale of the trust property, sums amounting in the whole to between 500*l.* and 600*l.*, representing, in part, costs incurred by the trustees in litigation with the tenants of part of the trust estate, and in part costs which the trustees were ordered to pay to the tenants in that litigation. The beneficiaries resist the claim, and assert that the trustees ought not to be indemnified or recouped any part of these sums out of the trust estate.

This question requires careful consideration, for the trustees had no personal interest in the litigation, and, undoubtedly, the practice of the Court is to indemnify trustees against all expenditure properly incurred in the due execution of the trust: *In re Jones* (1); *Turner* v. *Hancock*. (2) But costs of litigation embarked upon by trustees mero motu are not necessarily costs properly incurred in the due execution of the trust, and before considering how far, if at all, the principles of the cases I have just cited are applicable here, it is essential to ascertain whether the costs were in fact costs properly incurred in the administration of the trust.

Included in the trust property was and is a house at Notting Hill too large for the surroundings which have grown up around it, and a difficult place to let. Moreover, it had been structurally weakened and injured by its floors and walls having been overweighted when let for a time to a firm of printers who had used it as a store for their paper. In this somewhat rickety condition it was by a lease dated December 27, 1907, let for the purposes of a charitable institution to two ladies for a term of twenty-one years determinable by the lessees at the end of seven or fourteen years. The lease, which contained a covenant to repair specially qualified to meet the structural condition of the building, was determined in December, 1914, but before this it had been found necessary to shore up the premises to prevent their tumbling down, and in view of this fact and the generally unsatisfactory condition of the premises Mr. Dobb, who was throughout managing the trust affairs on behalf of his co-trustee and himself, had discussed with a firm of solicitors representing several of the beneficiaries the extent of the lessees' accruing liability for dilapidations at

(1) [1897] 2 Ch. 190. (2) 20 Ch. D. 303.

the end of the tenancy. The result of the discussion—contained in a correspondence which has been put in evidence—was that Mr. Dobb put the liability of the lessees on a much higher level than did the solicitors advising the beneficiaries.

Shortly before the determination of the tenancy a correspondence took place between the solicitors of the lessees and Mr. Dobb as to whether the tenants, if they wished so to do, could remain in occupation of the premises for a further half-quarter after Christmas, 1914, if their new premises were not ready for them. Mr. Dobb said they could, and when subsequently the tenants did not require to avail themselves of the option he asserted that they had in fact agreed by the correspondence to remain for the extra half-quarter at a rent of 60*l.* per annum, and in the action which he afterwards brought he included a claim for 7*l.* 10*s.* as this half-quarter's rent.

This action, out of which the difficulties have arisen, was brought in the name of both the trustees against the tenants, and the plaintiffs, in addition to the 7*l.* 10*s.*, claimed to recover 193*l.* 18*s.* for dilapidations, and 5*l.* for rent for the month which, it was alleged, would be consumed in making good such dilapidations.

Mr. Dobb instituted and conducted the action without consulting and without the knowledge of his co-trustee, or any one of the beneficiaries, or the solicitors with whom he had been in correspondence about this very question of dilapidations.

Moreover, the claim for 193*l.* 18*s.* was based on a survey of the premises made on Mr. Dobb's instructions, and a specification of a meticulous and microscopic description which included many items for which it was highly improbable, if not impossible, that lessees occupying under the qualified covenant could be made answerable.

When the solicitors and surveyors of the lessees took exception to the demand and asked for details and to be furnished with a copy of the survey or specification on which it was founded, Mr. Dobb declined to give particulars or to produce the specification, and refused to acquiesce in a most reasonable and proper suggestion that the surveyors of the respective parties should meet on the premises and discuss the whole question with a view to agreeing any points of difference, and ascertaining the proper sum to be

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paid by the lessees. It is impossible to read the correspondence before action without coming to the conclusion that Mr. Dobb's attitude throughout was unreasonable, and in the interests of his cestuis que trust lamentably unwise.

I can see no excuse for it and no explanation, unless it is that he was piqued at the repudiation by the lessees of any concluded agreement on their part to remain in occupation for another half-quarter.

The defendants by their defence denied the existence of any agreement to support the claim for 7*l.* 10*s.* and, without admitting liability, paid into Court the sum of 110*l.* as sufficient to satisfy the other claims in the action. Mr. Dobb thereupon consulted counsel, and was advised to obtain estimates from three builders of the cost of executing the works comprised in the specification on which the claim for 193*l.* 18*s.* was based. This he did, the estimates being 175*l.* 4*s.* 8*d.*, 168*l.* 10*s.*, and 168*l.* With these he again saw counsel, who advised that these tenders showed that the amount paid into Court by the defendants was insufficient and that the action ought to be proceeded with.

Counsel's advice was, in my opinion, unsound. It was not directed to the real point at issue, which had nothing to do with the reasonableness or the reverse of the charges for the work specified, but simply raised the question whether the lessees could be legally required to execute many of the items of work included in the specification. And so it came about that on the real question in the action Mr. Dobb was never assisted by competent advice. This was a misfortune for him, but it affords no excuse for his taking upon himself to continue to prosecute the action without informing his co-trustee, or any of the beneficiaries, of the substantial payment into Court and ascertaining their views as to whether it should be accepted in settlement, or the action be continued on the chance of obtaining more. Had he acted with ordinary prudence at this stage it is not improbable that his attention might have been called to the real issue involved in the action and the disaster which resulted from overlooking it been averted. For when the action in due course came on to be heard by the official referee the existence of any agreement to extend the tenancy was negatived, and after a most exhaustive investigation, in the course of which

the premises were visited and carefully inspected, the total amount which the plaintiffs were held entitled to recover was adjudged to be 90*l.*

The result was that the plaintiffs had to pay all the costs of the action as from the delivery of the defence, and, after allowing for the 90*l.* received in account from the defendants, the costs paid to them and the trustees' own costs of the litigation amount in the aggregate, as I have already stated, to a sum of between 500*l.* and 600*l.*

The question is, Can the trust estate be charged with these costs or any part of them? In *In re Beddoe* (1) Lindley L.J. says: "A trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances. If, indeed, the judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate." And still more trenchant are some observations of Bowen L.J. in his judgment.

Mr. Clayton has urged that inasmuch as 90*l.* was in fact recovered in the action it cannot fairly be characterized as an unsuccessful action, and, further, that the existence of a reasonable belief that the lessees had in fact contracted to extend the tenancy for a half-quarter and the advice given by counsel after the payment in constitute sufficiently exceptional circumstances to warrant the Court in acceding to this application.

I do not accept this view. From the date when the defendants paid in the 110*l.* the action has not only been unsuccessful but disastrous, and against Mr. Dobb's belief in the existence of the contract to extend the tenancy, and his taking and acting upon counsel's advice, I must set off the unreasonable attitude he adopted

(1) [1893] 1 Ch. 547, 557, 562.

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before action, and his unwarrantable and absolutely unexplained neglect to communicate with his co-trustee, or any of the beneficiaries, or their legal advisers, before commencing the action; and still more perhaps when the 110*l.* was paid into Court, the more reprehensible when he knew perfectly well that these advisers did not share his views as to the measure of the lessees' legal liabilities.

So far from these being exceptional circumstances to take this case out of the ordinary rule as laid down by the Court of Appeal, there are, in my opinion, circumstances which make this case one in which the rule ought to be rigidly applied. The neglect of the trustee to obtain any sanction of the Court to the course he pursued has been grievously aggravated by his deplorable conduct in commencing and prosecuting an action in the joint names of himself and his co-trustee without any communication with or authority from the latter, and by his taking upon himself to carry the whole litigation through without ever acquainting any one of the beneficiaries that an action was pending, and this although the estate had yielded them no return for some eighteen months, or more, before the litigation was commenced, and one of them—the annuitant who was wholly dependent on the rents for her annuity—was making piteous appeals to him for some payment on account.

Mr. Dobb has only himself to thank for the unpleasant position in which he finds himself. I am satisfied he has made out no case entitling him to charge his trust estate with these costs, and, except that I will allow him the difference between the party and party costs and the solicitor and client costs of the action down to the date of the payment in, I must leave him to put up with the consequences of the extremely ill-advised and improper conduct of which he has been guilty.

Solicitors for applicant: *White & Dobb.*
Solicitors for widow: *Crosse & Sons.*
Solicitors for other beneficiaries: *Murr, Rusby & Archer.*

G. M.

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July 31.

In re WOOLLEY.
CATHCART *v.* EYSKENS.

[1917 W. 1032.]

Will—Construction—Context—"Any other monies"—Residuary Bequest—Reversionary Interest in Personalty.

By his will a testator bequeathed to his niece moneys invested in two specified companies, "and any other monies which I may possess, and not mentioned in this will, and not herein otherwise disposed of." This gift was followed by other specific bequests. The testator was entitled to a reversionary interest in personalty not mentioned in his will:—

Held, that, having regard to the context, the word "monies" included investments, and the clause in which it occurred, having the characteristics of a residuary clause, was intended by the testator to contain a bequest of the whole of his personal estate including the reversionary interest.

In re Buller (1896) 74 L. T. 406 followed.

By his will, dated May 3, 1917, Herbert Martin Woolley directed his executors to pay his just debts and funeral and testamentary expenses, and then proceeded: "I give and bequeath to my niece Sylvia Eyskens, of Old Riffhams, Danbury, Essex, those monies invested in the British North Borneo Company, and in the Monterey Light and Power Company, and any other monies which I may possess and not mentioned in this will, and not herein otherwise disposed of."

The testator appointed his brother Charles Leonard Woolley and his sister Marjory Maud Woolley to be co-trustees of these moneys until his niece attained twenty-one. He also expressed a wish that the interest on certain moneys to which he was entitled in possession under his grandfather's will should be paid to his father, the Rev. George Henry Woolley, until his death, and after his death he bequeathed these moneys to his sister M. M. Woolley. The will contained gifts of other specific investments, and a bequest to his brother Lieutenant Geoffrey Harold Woolley, V.C., of his collection of foreign weapons and brass, "and all other personal effects to my sister, Marjory Maud Woolley." The will contained

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no formal residuary gift. The testator was killed on active service in France on October 9, 1916. He died possessed of nine items of property, inter alia, (*a*) a reversionary interest to which he was at the date of his death entitled under the marriage settlement of his parents dated December 7, 1874, expectant on the death of his father, the defendant the Rev. G. H. Woolley (and which was of the approximate value of 8286*l.* 7*s.* 1*d.*); (*b*) the sum of 109*l.* 2*s.* 6*d.* on a policy on the life of the testator in the Equitable Life Assurance Office; and (*c*) 25*l.* 4½ per cent. War Loan (Post Office issue). None of these were referred to in the will. The main question raised upon an originating summons by the plaintiff, Charles Henry Cathcart, the sole executor of the will, was whether, upon the true construction thereof, the gift to the testator's niece of "any other monies which I may possess and not mentioned in this will, and not herein otherwise disposed of," was a good residuary bequest and passed the reversionary interest. The respondents to the summons were Sylvia Eyskens (an infant), Marjory Maud Woolley, and the Rev. G. H. Woolley. Marjory Maud Woolley did not claim to be the residuary legatee under the gift to her of "all other personal effects."

H. S. Preston, for the plaintiff.

C. J. W. Farwell, for the first defendant. There is a good residuary gift to the first defendant. The word "money," standing alone without a context, would not be sufficient, but the words "any other monies" in the context in which they appear, and having regard to the concluding words of the clause, are sufficient to indicate a residuary bequest. "Monies" here must have a wider meaning than merely cash or coin. The testator meant to sweep in everything which he possessed. If not, there will be an intestacy as to this reversionary interest. On the cases, "money" has been held sufficient, with a context, to pass reversionary interests in personalty: *In re Egan* (1); *In re Buller* (2); *In re Skillen*. (3) The decision of Younger J. in *In re Gliddon* (4) was a decision that the words "all my monies" were not sufficient to pass a reversionary interest, as the judge held that there was no sufficient context in the will to show

(1) [1899] 1 Ch. 688.
(2) 74 L. T. 406.
(3) [1916] 1 Ch. 518.
(4) [1917] 1 Ch. 174.

that those words were used otherwise than in their ordinary legal sense; and he felt constrained to follow *Lowe* v. *Thomas*. (1) In the present case there is sufficient context to enable the Court to say that the words "any other monies which I may possess" pass the reversionary interest in question.

G. M. Hildyard, for M. M. Woolley and the Rev. G. H. Woolley. Without a context "monies" cannot be held to pass all personal estate. The case comes within *Lowe* v. *Thomas* (1) and cannot be distinguished from it. "Monies" may be held to mean "shares," or even investments, but not a reversionary interest in personal estate. The testator here never had it in his mind to make a residuary gift.

EVE J. The first point to consider in construing the language which this testator has employed is the use of the word "monies." Is it used in a sense more comprehensive than that which would confine its meaning to coin, or money to his credit at a bank? I think he has clearly used it in a sense which includes investments; and that is a most material consideration in determining the true character of the gift in which the word "monies" is the important word. In this case there is associated with the use of that word in the wider sense I have indicated a series of expressions which, in my opinion, are very material. The clause is in these terms: [His Lordship read the clause in the will set out above.] I think, with Mr. Farwell, that the expression with which that clause ends imposes upon it the characteristics of a residuary bequest, and I cannot read it either as a gift of money in its strict and limited sense, or merely as a gift of money with its wider significance. It must, I think, be read as a gift of all his investments other than the two specific ones thereinbefore mentioned and those subsequently mentioned in or otherwise disposed of by his will. So reading it, the fact that it is followed by specific bequests of investments and chattels to other persons does not, in my opinion, operate to restrict the meaning properly attached to this clause. If it were transposed from the beginning to the end of the will there could, I think, be little doubt but that it should be read as the residuary clause of the will, and I do not think its position here is sufficient ground in

(1) (1854) 5 D. M. & G. 315.

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itself for controlling the construction I have put upon it. In these circumstances am I to hold that the case falls within the line of authorities of which *Lowe* v. *Thomas* (1) is the leading case, or is it more properly placed amongst such cases as *In re Cadogan* (2), *In re Buller* (3), and *In re Egan?* (4) I have not got here what was present in *In re Egan* (4), namely, the imposition on the subject-matter of the gift of the liability to pay debts and testamentary and funeral expenses, and to hold that this case is covered by *In re Egan* (4) would be to overlook the weight properly attributed in that case to that element. But in *In re Buller* (3), a decision of Stirling J. prior in date to the decision in *In re Egan* (4), this element does not seem to have been present. The will contained a gift first of "all my money, except the sum of 400*l.* invested in the Belgravian Dairy Company, to my nephew, Harold Buller Giberne, and my godchild, Dorothy Frances Howell, in equal sums, to be kept in trust for them until they shall attain the age of twenty-five years"; followed by a gift of the interest of the money in the Belgravian Dairy Company to three persons for life, and on their deaths the whole invested sum was to be used for a particular charitable purpose. The question was, what was included in the bequest in the will of "all my money except the sum of 400*l.* invested in the Belgravian Dairy Company," followed as it was by a gift of the interest in the Belgravian Dairy Company to other legatees? Stirling J., in dealing with that particular question, while not prepared to accept the view which Kay J. had expressed in *In re Cadogan* (2) that the word "money," even without a context, might pass all the personal estate, came to the conclusion that it might pass any personal estate if the context showed that such was the intention of the testator. Then he goes on as follows: "Now, having come to the conclusion that 'money' can include more than cash, what construction am I to put upon the word as used here? The popular meaning of the word 'money' when used in a will is undoubtedly 'everything,' but it has been construed by the Courts on many occasions in a much more limited sense (*Byrom* v. *Brandreth* (5)). Here, however, I think it is used in the

(1) 5 D. M. & G. 315.
(2) (1883) 25 Ch. D. 154.
(3) 74 L. T. 406, 409.
(4) [1899] 1 Ch. 688.
(5) (1873) L. R. 16 Eq. 475.

wider sense, and that the testatrix intended to include in the gift all her personal property. I cannot see any sufficient reason for limiting the gift to property in possession only, and I therefore hold the gift included all her personal property both in possession and in reversion." And so here, I think the testator, having used the word in the wider sense, and having, as it appears to me, impressed this clause with the characteristics of a residuary clause, must be taken to have intended this to be a bequest of the whole of his personal estate including this reversionary interest, and I so hold.

Solicitors: *Robinson & Bradley.*

G. M.

In re MELTON.
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[1916 M. 2120.]

Executor—Retainer—Testator Surety for Residuary Legatee—Amount of Liability limited—Mortgage of Legatee's Share to Principal Creditor—Bankruptcy of Legatee—Valuation of Security by Principal Creditor—Proof for Balance—Assets insufficient—Payment of full Suretyship Liability by Executors—Assignment of Share by Principal Creditor—Principal Creditor not fully paid—Executors' Payment to be brought into Hotchpot by Assignee.

After a testator's death, a legatee of a one-fourth reversionary share in a residuary fund, on whose behalf the testator had given a continuing guarantee fully securing his banking account, but limiting the testator's liability to a specified amount, mortgaged his reversionary share to the bank to secure his account and subsequently became bankrupt. The bank as principal creditors valued their security and proved for the whole balance of their overdraft, on which they received under 10*s.* in the pound, and had no chance of obtaining full payment. The executors as sureties were then compelled to pay the sum of 313*l.*, the full amount for which they were liable under the guarantee. The bank, with the concurrence of the legatee's trustee in bankruptcy, subsequently sold the reversionary share to an assignee. On the reversion falling in and the estate becoming divisible:—

Held, that the 313*l.* must be brought into hotchpot by the

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assignee on the ground that it did not form part of the assignor's estate at the time of his bankruptcy.

Midland Banking Co. v. *Chambers* (1869) L. R. 4 Ch. 398 applied.

In re Binns [1896] 2 Ch. 584 overruled.

Decision of Astbury J. affirmed.

APPEAL from a decision of Astbury J.

On October 26, 1901, the testator, Richard Melton, and James Chapman gave the London and Provincial Bank a joint and several guarantee to secure the repayment of all moneys at any time thereafter for the time being due on the account of the testator's son Arthur Melton, and declared that it should be a continuing guarantee to the extent at any time of 500*l.* for the amount for the time being owing and should bind their executors and administrators. The guarantors could not determine the guarantee without the bank's consent, but their executors or administrators might determine it on one month's notice.

By his will, dated February 14, 1906, the testator, after appointing his wife, his son Arthur, and the plaintiff David Milk his executors, and giving his personal estate to his wife subject to the payment of his debts, funeral and testamentary expenses, devised his real estate to his wife for life, and after her death to his son and Milk upon trust for sale, the net proceeds to be held in trust for his children in equal shares.

The testator died on July 6, 1907, leaving his wife, his son Arthur and three daughters surviving.

His will was proved by all the executors, who took no steps to determine the guarantee, of which they were given formal notice on July 20.

The personal estate of testator was small and insufficient for the payment of his debts and funeral and testamentary expenses.

On June 4, 1910, Arthur mortgaged his share to the bank to secure his account, and on June 6 notice of this mortgage was given to the executors.

On April 19, 1911, Arthur absconded, and on May 24 a receiving order was made against him, and he was subsequently adjudicated a bankrupt on June 12 and had never obtained his discharge.

At the date of the adjudication he owed the bank 1057*l.*, which by December 30 was increased by bank interest and charges to

1113*l.* The bank valued their mortgage security at 158*l.* and proved in the bankruptcy for the balance of their debt, on which they received a dividend of 494*l.* There was no chance of their obtaining anything like 20*s.* in the pound.

In January, 1912, the bank called upon the testator's executors (other than the bankrupt) and Chapman's executors to pay 500*l.* under the guarantee, with interest from the date of demand.

Chapman's executors were willing to pay 250*l.* and interest, but the testator's executors could only raise that amount by sale or mortgage of the real estate, which in the circumstances they could not do without an order of the Court.

On February 15, 1912, the widow and Milk, as executors, issued an administration summons—*In re Melton, Melton* v. *Melton* [1912 M. 406]—and on May 21, 1912, an order was made giving them liberty to sell or mortgage the real estate for the purpose of paying debts, without the bankrupt's concurrence.

The widow and Milk then raised 420*l.* by mortgage and paid off (inter alia) the 250*l.* guarantee and 63*l.* interest, i.e., 313*l.*

By an assignment dated April 30, 1915, the bank as mortgagees, with the concurrence and consent of the official receiver as trustee of the bankrupt's estate, testified by his execution of the deed, assigned the bankrupt's share to Mrs. Frances Melton, the bankrupt's wife, absolutely in consideration of 75*l.* paid by her to the bank out of her separate estate.

The testator's widow died on April 13, 1916, and the estate thereupon became distributable.

On July 27, 1916, the plaintiff Bell was appointed co-trustee with the plaintiff Milk in the place of the bankrupt, and the real estate was vested in the two plaintiffs.

On August 25, 1916, the real estate was sold for 2645*l.*, and after payment of mortgages and costs the plaintiffs had in hand 1597*l.* 18*s.* 10*d.* net proceeds for distribution among the three daughters and wife of the bankrupt as assignee of his share.

The question arose whether the 313*l.* paid under the guarantee ought to be brought into account and retained as against the assignee's share.

On December 6, 1916, the plaintiffs issued this originating

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summons to determine the point, which was heard before Astbury J. on June 15, 18, 1917.

Astbury J. held that the 313*l.* must be brought into account. After referring to *In re Sass* (1), *In re Binns* (2), *In re Akerman* (3), *In re Wheeler* (4), *In re Whitehouse* (5), and *In re Watson* (6), his Lordship said that after the guarantee was discharged the bank's only claim to the share was through the son. The plaintiffs and the daughters were not seeking to prove or establish any right in the son's bankruptcy by reason of the payment under the guarantee. As against the principal creditors they were precluded from so doing. They were merely asserting that the testator's estate, having discharged its liability under the guarantee, was not bound to pay the bankrupt-trustee-beneficiary twice over, and his assigns, i.e., the bank and the assignee, were in no better position. The question whether the plaintiffs could have proved in respect of their right of indemnity as sureties was not the determining factor. The true principle was that the testator's estate having satisfied its debt neither the principal creditors nor the trustee in bankruptcy could demand payment of more than the unpaid amount of the bankrupt-trustee-beneficiary's share: see *In re Rhodesia Goldfields, Ld.* (7) and *In re Dacre.* (8) Why should the son's bankruptcy enable him or his assignees to obtain more than this? *In re Binns* (2) was distinguishable, as no payment had been made under the guarantee, and the 2400*l.* deposited by the testator with the bank had not been applied by them in discharge. It was difficult, however, to appreciate how the right of retainer arising from the right of indemnity in that case could have been affected by the sons' subsequent bankruptcy; but it was unnecessary to discuss that point.

The assignee appealed. The appeal was heard on October 19, 22, and 23, 1917.

L. F. Potts, for the appellant. The appellant claims as assignee either under the bank or the trustee in bankruptcy. It may be

(1) [1896] 2 Q. B. 12.
(2) [1896] 2 Ch. 584.
(3) [1891] 3 Ch. 212.
(4) [1904] 2 Ch. 66.
(5) (1887) 37 Ch. D. 683.
(6) [1896] 1 Ch. 925.
(7) [1910] 1 Ch. 239.
(8) [1916] 1 Ch. 344.

admitted that the assignment is subject to all equities, and that all the appellant can take is the share of Arthur in the testator's estate after all equities have been satisfied. What are those equities? Is there any equity in the executors to retain? Arthur himself would no doubt have had no title, but the appellant gets a clear title under the bank or the trustee in bankruptcy or both.

[WARRINGTON L.J. If you take under the bank you are in no better position than Arthur.]

The appellant relies upon the rule against double proof in bankruptcy. In the case of bankruptcy, where the principal creditor proves that operates as a satisfaction of the debt. The surety cannot prove in competition with the principal creditor, there being only one debt and that having been satisfied by the proof of the principal creditor. It is true that the executors, as sureties, have paid under the guarantee, but that gives them no right to prove against the debtor's estate, the debt being no longer subsisting. The executors are, however, seeking to get the same relief by virtue of the right of retainer. The foundation of the cases is that there must be an existing debt, an actual liability. There is here no existing debt. The debt has gone as the result of the bankruptcy. The executors having no right of proof have no right of retainer. The surety can only protect himself by paying off the principal creditor in full and standing in his shoes.

Under the law of principal and surety, where the principal debtor is a bankrupt, the principal creditor has a right to prove against the estate notwithstanding that he may have received from the surety the whole amount of his guarantee. The surety in such a case can only prove where the principal creditor has received 20*s.* in the pound: *In re Sass.* (1) In *Stammers* v. *Elliott* (2), where an executor had proved in the bankruptcy of a residuary legatee in respect of a debt due from him to the testator's estate and received a dividend on the proof, it was held that the executor had thereby lost his right to retain the debt out of the share of the bankrupt in the testator's residuary estate. The proof and receipt of dividends was treated as a satisfaction of the debt. The present case is entirely covered by the decision in *In re Binns* (3), and that

(1) [1896] 2 Q. B. 12. (2) (1868) L. R. 3 Ch. 195.
(3) [1896] 2 Ch. 584.

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case is not distinguishable. In *In re Whitehouse* (1) the principal creditor had been paid in full by the executors of the surety, and it was held that if they claimed to recover against the principal debtor, who took a benefit under their testator's will, they must give up their right of retainer. In *In re Watson* (2) there had been no proof either by the principal creditors or by the surety, and the creditors paid themselves out of their security. That case is therefore distinguishable from the present, and the remarks of North J. as to the effect of *Stammers* v. *Elliott* (3) are in favour of the appellant. In *In re Sewell* (4), where a defaulting trustee-beneficiary became bankrupt, and new trustees were appointed, who received a dividend under a composition approved by the Court, it was held that the new trustees by receiving the dividend had assented to the composition that the debt due to the estate by the defaulting trustee was no longer in existence, and that there was no right of retainer against him. That is a strong case in favour of the appellant. [He also referred to *In re Wheeler* (5), *In re Akerman* (6), *Armstrong* v. *Armstrong* (7), *In re Rhodesia Goldfields* (8), and *In re Dacre* (9), which he distinguished on the ground that there was no bankruptcy in that case.]

Meyrick Beebee, for the respondent three daughters. The rule against double proof in bankruptcy has no application in a case of this kind. This case falls within the simple principle that a debt arising under an obligation to indemnify a surety can be deducted by the executors of the surety from a legacy or share of residue given to the debtor. The executors stand outside the bankruptcy altogether and rely on the executors' right of retainer. The money paid by the executors under the guarantee never formed part of the bankrupt's estate: *Midland Banking Co.* v. *Chambers*. (10) Before the bankruptcy the executors had a lien on Arthur's share in respect of his equitable obligation to indemnify them against any sum that they might be called upon to pay under the guarantee. That equitable obligation was not destroyed by the

(1) 37 Ch. D. 683.
(2) [1896] 1 Ch. 925.
(3) L. R. 3 Ch. 195.
(4) [1909] 1 Ch. 806.
(5) [1904] 2 Ch. 66.
(6) [1891] 3 Ch. 212.
(7) (1871) L. R. 12 Eq. 614.
(8) [1910] 1 Ch. 239.
(9) [1916] 1 Ch. 344.
(10) L. R. 4 Ch. 398.

proof in bankruptcy of the principal creditors. The equitable right of the executors to retain as against Arthur was in the nature of an equitable lien: *Ex parte Mitford* (1), which is referred to in *Priddy* v. *Rose* (2), where the form of order shows that executors seeking to retain for the amount of their indemnity are in the same position as secured creditors. The executors here are relying on their lien: *In re Whitehouse.* (3) The executors have discharged the guarantee out of the testator's residuary estate, and not out of property belonging to the debtor, and they are entitled to a lien on the beneficial interest of the debtor under the will, and not merely to a right of set-off: *Ex parte Mitford.* (1)

It is admitted that the executors must do nothing to prejudice the rights of the principal creditors. They have done nothing. The bank could, and did, prove for the full balance of their debt after valuing their security: *Willes* v. *Greenhill* (*No.* 1). (4) The executors were entitled to stand outside the bankruptcy and rely on their security: *In re Yewdall.* (5) Their security still remained although the mortgage debt to the bank was discharged by the bankruptcy: *Lyde* v. *Mynn.* (6)

[SCRUTTON L.J. You have to bring yourself within s. 7, sub-s. 2, of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59).]

The executors were secured creditors in respect of their contingent liability under the guarantee. A "secured creditor" is defined by s. 167 of the Act to include "a person holding a mortgage charge or lien on the property of the debtor."

[SCRUTTON L.J. referred to *Government of Newfoundland* v. *Newfoundland Ry. Co.* (7)]

The right of the executors is incorrectly described as a mere set-off: *In re Akerman.* (8)

[WARRINGTON L.J. referred to *Cherry* v. *Boultbee* (9) and *In re Peruvian Railway Construction Co.* (10)]

In the latter case the articles of association gave the company no lien on the shares and the shareholder died insolvent before

(1) (1784) 1 Bro. C. C. 398.
(2) (1817) 3 Mer. 86, 105.
(3) 37 Ch. D. 683.
(4) (1860) 29 Beav. 376.
(5) (1877) 46 L. J. (Bk.) 87, 109.
(6) (1831) 4 Sim. 505.
(7) (1888) 13 App. Cas. 199.
(8) [1891] 3 Ch. 212.
(9) (1839) 4 My. & Cr. 442.
(10) [1915] 2 Ch. 144, 442.

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the company went into liquidation, so that the case was the same as *Cherry* v. *Boultbee* (1), and the liquidator could only claim the dividends payable in the administration of the shareholder's estate. In *In re Binns* (2) great stress was laid in argument on the fact that the money deposited with the bank enabled them to pay themselves. North J. did not deal in his judgment with the point that the trustees were secured creditors. In *In re Watson* (3) North J. did recognize that a surety might stand outside the bankruptcy.

I rely on *Stammers* v. *Elliott* (4) as showing that the executors have a right to retain, although it was there held that the executor had, by proving in the bankruptcy, elected to give up his security.

[SWINFEN EADY L.J. Do you wish to say anything about *In re Sewell?* (5)]

In that case the executors elected to come in under the composition deed and thereby gave up their security.

W. R. Sheldon, for the respondent executors, took no part in the argument.

L. F. Potts in reply. It is a misconception of the authorities to treat the executors here as secured creditors. The head-note to *Willes* v. *Greenhill* (*No.* 1) (6) no doubt does state that the lien of the executors had priority over the mortgage in that case, but the judgment of the Master of the Rolls is inconsistent with there being any lien. *Stammers* v. *Elliott* (4) shows that the debt in respect of which the executors seek to retain must be held to have been satisfied.

[SWINFEN EADY L.J. That case is against your argument that after the debt is extinguished there is no right of retainer.]

There was only one debt. The principal creditors having proved, the sureties were prevented from proving, as the debt was deemed to have been satisfied. The executors are endeavouring to make the debtor's estate liable for the same debt. *In re Binns* (2) is on all fours with the present case and has been accepted as law for many years. If it is overruled the effect will be to upset a number of titles. [He also referred to *In re Oriental Commercial*

(1) 4 My. & Cr. 442.
(2) [1896] 2 Ch. 584.
(3) [1896] 1 Ch. 925.
(4) L. R. 3 Ch. 195.
(5) [1909] 1 Ch. 806.
(6) 29 Beav. 376.

Bank (1), *In re West Coast Gold Fields, Ld.* (2), and *Hopkinson* v. *Rolt.* (3)]

SWINFEN EADY L.J. This is an appeal from a decision of Astbury J. whereby he declared (inter alia) that, in the events that had happened, the plaintiffs, as trustees of a will, were entitled to retain as against the defendant Mrs. Melton, or to deduct from the share of which she was an assignee, the sum of 313*l.* 13*s.* 8*d.*

The question arises in this way. On October 26, 1901, the testator, Richard Melton, gave a guarantee to a bank for his son Arthur ; a Mr. Chapman joined in the guarantee. It was a joint and several guarantee on the bank's printed form, which is of an elaborate character. The effect of the guarantee is that it is a continuing guarantee for the whole of the debt owing from Arthur to the bank from time to time, with a limit of the liability of each surety to 250*l.* It is not disputed that under a guarantee in that form the creditor is entitled, on the bankruptcy of the debtor, to prove for the whole amount that is due without bringing into account what, if anything, he may have received from the surety, subject always to the condition that the creditor should not receive more than 20*s.* in the pound.

The testator, Richard Melton, by his will gave his personal estate to his wife, subject to his debts, funeral and testamentary expenses. The personal estate was small, and insufficient to pay the debts, funeral and testamentary expenses. The testator also had some realty, and he gave that, after the death of his widow, upon trust for sale and conversion and to divide the net proceeds among his son and three daughters. The son Arthur therefore took one fourth of the proceeds of sale of the testator's real estate subject only to this, that the personal estate being insufficient for payment of debts, there was recourse to the real estate.

The testator died on July 6, 1907. On June 4, 1910, the son Arthur mortgaged his share under the will to the bank to secure a debt. On June 12, 1911, Arthur was adjudicated a bankrupt. He has never obtained his discharge in the bankruptcy. In the autumn of 1912 a sufficient amount was raised out of the real estate

(1) (1871) L. R. 7 Ch. 99. (2) [1906] 1 Ch. 1.
(3) (1861) 9 H. L. C. 514.

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to pay the debts of the testator remaining unpaid, including the 250*l.* which the testator's estate was called upon to pay under the guarantee, with an amount for interest, bringing up the total sum paid to 313*l.* 13*s.* 8*d.*

On April 30, 1915, Arthur's wife, the present appellant, purchased Arthur's share under his father's will from the bank as mortgagees, the trustee in bankruptcy of Arthur's estate concurring in the assignment. In this way the appellant became entitled to Arthur's share of the testator's estate.

The rest of the real estate has now been sold, and after paying expenses there remains a sum of 1597*l.* 18*s.* 10*d.* for distribution amongst the testator's four children. It is almost 1600*l.*, and I will refer to it as 1600*l.*

The appellant claims that she is entitled to receive one fourth of this sum, say about 400*l.*, without any deduction in respect of the 313*l.* Against her it is said that the estate consists not only of the sum of 1600*l.*, but also of the 313*l.* which the estate has paid on behalf of the son, and in respect of which the son Arthur was indebted to his father under the agreement that the debtor must indemnify the surety for the obligations of the surety. Therefore, treating the 1600*l.* and 313*l.* as making roughly 1900*l.*, the trustees say to Mrs. Arthur, "You are entitled only to one fourth of about 1900*l.*, of which you have in hand 313*l.*"

The point that arises on this originating summons is to determine which of these views is right, and in what way this fund now in the hands of the trustees ought to be dealt with.

It is not disputed that under an ordinary creditors' deed—and it would be the same in bankruptcy for this purpose—the creditor could, having regard to the form of the guarantee, prove for the whole amount of the debt; and the bank have in this case carried in a proof against the bankrupt's estate for the balance of their debt after valuing their security. They could do that notwithstanding that the surety on account of his liability might have made a payment to the bank. In carrying in their proof the bank were not bound to give credit for that, but might prove for the whole amount just as if no payment had been made by the surety. I think, further, it cannot now be disputed that the position would be the same although the payment made by the surety to the

creditor had been made not out of his own money but out of the proceeds of a counter-security given to him by the debtor to indemnify him against his liability as surety. That is the effect of the decision in *Midland Banking Co.* v. *Chambers.* (1) There the surety had paid to the bank, who were the creditors, a sum of 300*l.*, and the surety had received a mortgage from the debtor to secure his liability under the guarantee. Then the debtor executed a creditors' deed, and the trustee under the deed realized the mortgaged property and paid the surety the sum of 300*l.* Notwithstanding this the principal creditor claimed to prove for the whole amount of the debt, 410*l.*, without giving credit for the 300*l.* It was urged, in the same way as Mr. Potts has urged here, that it was paying the debt out of the debtor's property twice over, because it was out of his property that the 300*l.* paid by the surety to the bank has been raised, so that if the bank were allowed to prove for the full amount of their debt, there would be payment of the debt twice over. That did not find favour with the Court; and Giffard L.J. on appeal dealt with the matter in this way: "The argument that it"—that is, the 300*l.*—"has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditors' deed been dedicated to the purpose of indemnifying the surety, was not, at the time of the execution of that deed, part of the debtor's estate. Such a payment stands on the same footing as if it had been made by Thorpe"—that is, the surety—"out of his own moneys, and furnishes no ground for reducing the proof." Upon the construction of a guarantee similar to the one in the present case *In re Sass* (2) was to the same effect; and it has not been disputed that the form of the guarantee here is such that the bank could prove for the full amount of the debt. It is quite true, as Mr. Potts urged, that there can be no double proof against the estate; and the rule against double proof has regard to the substance of the transaction and not to the form. It may well be that technically there are two claims against the debtor in respect of the transaction and two separate liabilities of the debtor arising out of the transaction. One of these is the debtor's liability to the bank for the money that he owed. The other, which is a separate

(1) L. R. 4 Ch. 398, 402. (2) [1896] 2 Q. B. 12.

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liability arising out of the contract of guarantee, is the debtor's liability to indemnify the sureties in respect of their liability to the principal creditor. Technically they are two separate liabilities, but in substance they are the same; and in respect of that liability there could not be a double proof against the estate. The creditor could not prove for the amount of the debt and the surety bring in a proof for part of the same amount as regards his liability for that part of that amount. I think that it is clear from what Mellish L.J. said in *In re Oriental Commercial Bank.* (1) Mellish L.J. there said: "This rule against double proof applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up. It seems to me that the principle is a perfectly sound one." And then, after referring to the extent to which the principle should be carried, he proceeded in this way; "But the principle itself—that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts." That applies to a case of principal and surety. There could not be a double proof in respect of that obligation.

Apart from the debtor having become bankrupt, I think it cannot be questioned that the debt arising under an obligation to indemnify a surety can be deducted from a legacy or share of residue given to the debtor. The case was referred to of *Willes* v. *Greenhill* (*No.* 1). (2) There a residuary legatee mortgaged his share of residue. After the mortgage, a debt of that legatee for which the testator had become surety was paid out of his estate. Of course, the liability of the testator, as surety, was existing at the date of his death. Then, after the testator's death, the legatee mortgaged his share, and subsequently to the creation of the

(1) L. R. 7 Ch. 99, 103. (2) 29 Beav. 376, 382.

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mortgage the surety's obligation was discharged. It was held by Sir John Romilly M.R. that the lien of the executors had priority over the mortgage; and he put it in this way: "The share of a residuary legatee is not ascertained until all the charges on the testator's estate have been paid and all equities between each legatee and the testator's estate have been settled; that which remains after this alone constitutes the residue. It does not differ in this respect from a pecuniary legacy." Then the Master of the Rolls continued: "If a testator leave 1000*l.* to A. and A. owed the testator 100*l.*, the legacy is discharged by paying 900*l.* to the legatee or his assigns; in like manner if an equity exist at the death of the testator between him and one of his residuary legatees, the share of that person in the residue is only so much as remains after satisfying what is due to the testator's estate." Henry was the one who had mortgaged his share in that case; and the Master of the Rolls said: "All that the mortgagee advanced his money upon was the share that Henry was entitled to receive out of the testator's estate, viz., one-sixth of the clear residue, and which residue must be increased by his paying a sum which the testator's estate has been compelled to pay for his benefit, and which must be treated as a set-off against his share." Whether it be treated as a set-off or payment, or in whatever way, it has to be brought into account. "This, therefore, while it increases the testator's estate and the shares of the other five residuary legatees, diminishes his own, which is only one-sixth of the whole after the repayment of the sum for which the testator was surety for him, and which the executors have been compelled to pay. I am of opinion that Henry's share is only the amount less the recouping that which the testator's estate has paid, and accordingly the mortgages are charges on that diminished share only." The words used by the Master of the Rolls are "if an equity exist at the death of the testator." Now what was the position here? At the death of the testator Arthur took under the will a share of the proceeds of sale of the real estate. At the same moment Arthur was under an obligation to indemnify the testator against the consequences of the guarantee; and the money paid out of the testator's estate in discharge of that liability would, therefore, obviously be brought in as against Arthur in respect of his share of the estate. It is

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money which he is liable to repay to the testator's estate; and he is to be treated as already having in his possession that sum. That is how the matter stands, apart from the bankruptcy.

It remains to consider the position under the bankruptcy. I apprehend it is clear that even when there is a bankruptcy, but the principal creditor has not brought in a proof in bankruptcy, the right of the surety and the trustees of the surety's estate would not be affected. I think that follows from *In re Watson.* (1) In that case a testator was a surety for a mortgage, and by his will he bequeathed a share of the residue of his estate to the mortgagor for whom he was surety. Then the mortgagor became bankrupt and he never obtained his discharge. Neither the mortgagees as the creditors, nor the testator's executors as the representatives of the surety, proved in the bankruptcy. After the bankruptcy the executors made some payments to the mortgagees in respect of the liability of the testator under the contract of suretyship. It was held that the executors were entitled, notwithstanding the bankruptcy, to retain out of the mortgagor's share of the residue the amount of the payments which they had made to the mortgagees. North J. (2) in a reserved judgment of considerable length dealt with the position of the assignees of the mortgagor's share and referred fully to the authorities. He pointed out that the assignees of the share were in no better position than the son himself would have been in if alive and not a bankrupt; and he held that the trustees were entitled to retain out of the share of the son what had been paid out of the father's estate in respect of that liability as surety. Down to that point I think there is no dispute; but it is said that the proof by the creditor against the estate affects the right of the surety; and that where the creditor has proved against the estate of the bankrupt, the right of the representatives of the surety to make this deduction is lost. I cannot see why. Mr. Potts contended that, by virtue of the bankruptcy and the proof by the creditor, the debt was gone and there was nothing owing in respect of which the executors had a right of retainer. I put the case to him of a surety receiving a specific charge by deposit of deeds to indemnify him in respect of his suretyship, and the creditor proving in the bankruptcy. If as a result

(1) [1896] 1 Ch. 925. (2) [1896] 1 Ch. 931.

of the principal creditor having proved there was no longer any debt, it would follow that the trustee in bankruptcy could then come to the surety and say "Give up the deeds; there is no debt in respect of which you are entitled to them; give them up to me as trustee in bankruptcy." It would be quite impossible to argue thus, and Mr. Potts conceded that. The only authority on which he relied in support of his proposition was the case before North J. of *In re Binns.* (1) That was a case in which the surety had deposited with the bank, who were the creditors, a sum of 2400*l.* as a continuing security for any amount which might be due to the bank from his two sons as principal debtors. The two sons having been adjudicated bankrupt the bank proved in their bankruptcy for the whole amount of their debt, 8858*l.* No dividend had been paid in the bankruptcy, but it was conceded that it was improbable that the estate of the bankrupts would realize enough to pay the bank in full, and that the bank would ultimately appropriate the whole of the deposit towards the payment of the sons' debt. The question was whether the trustees of the father's will were entitled to retain the legacies and shares of residue bequeathed to the sons against the liability of the father's estate as surety to the bank. North J. dealt with the case upon the footing of what the position would have been if the sons had not become bankrupt, and he said: "Suppose that the sons had gone to the executors immediately after the father's death, and had pointed out to them that there was a large estate, and that they wished to receive their legacies; or suppose that a year had elapsed from the father's death, and that the time had therefore come at which they would have had a right to ask for payment of their legacies, and they had come and asked for them, the executors would then have been entitled to say, 'There is a matter still pending between your father's estate and you: he has become surety for you as principal debtors to the bank: he is entitled to have the security which he has given as your surety released, and to be indemnified by you against any claim which can be made by the bank upon the security, or upon himself as giving that security.' It seems to me the executors would have been then in a position to say to the sons that, although they were not indebted in any particular

(1) [1896] 2 Ch. 584, 587, 588.

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amount to their father in respect of this transaction, they were bound to indemnify his estate against all liability by reason of his having become surety for them at their request. Under these circumstances the executors might have declined to pay over the legacies to the sons until the account had been worked out and the amount of the liability ascertained." Now that would undoubtedly have been the position apart from bankruptcy. Then the learned judge went on to consider what was the effect of the bankruptcy, and he said: "How, then, does the matter stand between the testator's estate and the sons? The trustees of the testator's estate still say to the sons, 'We will not pay over to you any part of your legacies or shares of residue till we have been indemnified by you.'" Now here comes the passage in the judgment which has been criticized: "But the difficulty in their way is this—that there is no debt in respect of which the trustees of the will can at present claim to retain anything as against the trustees of the sons' estate. The claim against that estate is made by the principal creditors; and the surety cannot as against the principal creditors set up an adverse claim of any kind." That is the same fallacy that was exposed by Giffard L.J. in *Midland Banking Co.* v. *Chambers.* (1) The claim of the surety is not an adverse claim set up against the principal creditors. The suggestion is that it is set up against the principal creditors because the estate that would be divisible in the bankruptcy is diminished by reason of this claim. The fallacy is that at the date of the bankruptcy what was claimed was not part of the debtor's estate. An equity that the testator's estate should be indemnified in respect of his liability under the guarantee arose at his death; and when the sons became bankrupt there was already an equity subject to which the trustees in bankruptcy took the sons' interests; and the trustees in bankruptcy took nothing more than the debtors had, and the debtors' interests under the will were subject to this equity. In my opinion the judgment of North J. in this respect was erroneous, and I think he fell into that fallacy that was exposed by Giffard L.J. in *Midland Banking Co.* v. *Chambers.* (1) For these reasons I am of opinion that that case was wrongly decided. I think, therefore, that there is nothing in the present case to prevent

(1) L. R. 4 Ch. 398, 402.

the trustees of the will now maintaining their right to say that the share in which Arthur and his assigns are interested is a share in an estate increased by the 313*l.* that Arthur owes to the estate.

The other cases that were cited in argument do not throw much further light on the question. *Stammers* v. *Elliott* (1) was in effect simply a case where a creditor had proved without valuing his security; and the Court merely held that he could not prove for the whole debt, and also rely on his security, but that, having proved for the whole debt, he must be treated as having given up his security. Nor do I think that *Cherry* v. *Boultbee* (2) really affects the question, because when you come to consider it the position there at the death of the testatrix was only that she had a right to prove which she had not exercised. At the death of the testatrix there was a right to prove under a commission for the debt; and she was entitled to dividends only; and she had never exercised her right. I only refer to this case because the nature of the right of the executor to retain, which is not strictly a right of set-off, was dealt with in a passage in the judgment of the Lord Chancellor, where he says: "The term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off."

In re Peruvian Railway Construction Co. (3) was a similar case to *Cherry* v. *Boultbee* (2), and was decided on the same ground. There the deceased, Mr. Alt, was a debtor to the company at the time of his death; he died insolvent, and the company had a right to prove against his estate and receive dividends, but that was all; and it was years after the death that in the winding up of the company there was some return upon his shares, and so his estate became entitled to receive a sum of money. The liquidator of the company was held to be entitled to retain only the proper dividend on the debt owing to them. That case is practically the same as *Cherry* v. *Boultbee* (2), and was decided on the same ground. The only other

(1) L. R. 3 Ch. 195. (2) 4 My. & Cr. 442, 447.
(3) [1915] 2 Ch. 144, 442.

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case I need refer to is *In re Whitehouse* (1), which was decided by Stirling J. The language used there is appropriate, and only appropriate, to the facts of the particular case. Stirling J. there pointed out the respective rights of the principal and of the surety; but it was a case of composition and not of bankruptcy.

For these reasons I am of opinion that the appeal wholly fails. Care must be taken in properly expressing in the order the effect of the decision. I mention this because I see in the affidavit in support of the application that one of the trustees says that he and his co-trustee "now have in our hands the sum of 1597*l.* 18*s.* 10*d.* for distribution amongst the four children"; and that Arthur's assignee claims a one-fourth share of the proceeds; and that the question is whether out of that share there ought to be deducted the sum of 313*l.* That is not quite right. The fund treated as being available for division must first be increased by the amount which Arthur owes, and then his assign is entitled to one fourth of that entire amount subject to this, that she must give credit for the 313*l.* that he has already notionally received.

WARRINGTON L.J. I am of the same opinion; and I think I can express my reasons in a few words. The question arises in this way. The appellant is the assignee of the son Arthur's share in a portion of the testator's estate. The trustees of the will, when called upon to pay over Arthur's share, claim in effect to deduct from that share the amount by which Arthur is indebted to the testator's estate. The appellant disputes that right; and the question is whether the trustees have it or not under the circumstances of the case.

The facts, so far as they are material, are these. Under the will of his father, who died in the year 1907, Arthur, as one of the four children of the testator, was entitled, subject to his mother's life estate, to a one-fourth share of the proceeds of sale of his father's real estate. The estate has been realized now, and the net proceeds are about 1600*l.* The testator in his lifetime had guaranteed Arthur's current account at his bank. I will pause there for one moment. At the death of the testator what was the position as between the testator's estate—treating the proceeds of sale of the

(1) 37 Ch. D. 683.

real estate as his estate—and Arthur, whose account at the bank had been guaranteed ? I think it is quite clear that the trustees at that time had a right to be indemnified against any claim which they might ultimately have to satisfy as the result of the guarantee ; and to retain in their hands so much of Arthur's share as was sufficient to provide for that indemnity. But it is said that subsequent circumstances had deprived them of that right. Those subsequent facts are as follows : After the death of the testator the son became bankrupt, the bank having previously taken a mortgage of his share for the purpose of securing their debt ; and in the bankruptcy the bank placed a value on that security and proved and received dividends on the entire balance of the debt, without reference to the fact that part of it had been guaranteed. That, of course, they were entitled to do. They have since realized the security which they held ; but the net result is that they have not yet received 20*s.* in the pound on the entire debt. It is said that those circumstances deprive the trustees of the right which, but for those circumstances, they would certainly have had. I ask myself why.

The first question as to which one has to satisfy oneself is, What is really the nature of the right which the trustees had as against Arthur, the beneficiary under the testator's will ? That is clearly expressed by the Lord Chancellor in *Cherry* v. *Boultbee.* (1) It had been suggested there that the right of the trustees was in the nature of a set-off. The Lord Chancellor combats that view and says this : " It must be observed, that the term ' set-off ' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid ; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt." The important part of that passage is that the right of the executor is a right to pay out of the fund in hand. I think it follows from that that if the right of the executors

(1) 4 My. & Cr. 447.

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at the testator's death was to pay out of the share sufficient to discharge and satisfy the claim to be indemnified, then so much of that fund as was necessary to make good the trustees' claim never formed part of Arthur's estate so as to become divisible in bankruptcy amongst his creditors. In saying that I am only adopting the view clearly expressed by Giffard L.J. in *Midland Banking Co. v. Chambers.* (1) It seems to me clearly a corollary of the statement by the Lord Chancellor of that which is the executors' right. Giffard L.J. said: "The argument that it"—that is, the payment that had been made in that case—"has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditors' deed"—an equivalent in that case to the bankruptcy in the present case—"been dedicated to the purpose of indemnifying the surety, was not, at the time of the execution of that deed, part of the debtor's estate." In my judgment, therefore, the answer to the claim put forward by the assignee, who is in the same position, of course, as Arthur, is that the 313*l.* requisite to repay the testator's estate that which had been paid in satisfaction of the guarantee never formed part of the bankrupt's estate so as to be divisible amongst his creditors. That completely answers the argument put before us founded on the undoubted principle that in bankruptcy there can never be a double proof for the same debt. It is not a question of double proof at all. In my judgment North J. in *In re Binns* (2) fell into that fallacy to which Giffard L.J. referred. The facts in *In re Binns* (2) are undoubtedly, for all substantial purposes, identical with those of the present case; and if that case was rightly decided it would decide the present case; but in my opinion that case was not rightly decided, and the fact that North J. unwittingly fell into the fallacy referred to by Giffard L.J. is shown by the following passage in his judgment (3): "The difficulty in their way" (that is, in the way of the trustees) "is this—that there is no debt in respect of which the trustees of the will can at present claim to retain anything as against the trustees of the sons' estate. The claim against that estate is made by the principal creditors; and the surety cannot as against the principal creditors set up an adverse claim of any

(1) L. R. 4 Ch. 398, 402. (2) [1896] 2 Ch. 584.
(3) [1896] 2 Ch. 588.

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kind. No doubt when the principal creditors have been paid in full the position of matters would be different." There are two statements there which seem to me to be unfounded, in the sense that they do not afford a foundation for the decision at which the learned judge arrived. The first of those statements is that "there is no debt in respect of which the trustees of the will can at present claim to retain": that seems to me to be quite incorrect. The trustees held a certain fund. They have a right to retain in their hands part of that fund in satisfaction of a claim which they have, and which they had before his bankruptcy, against the debtor. It seems to me quite immaterial whether there was a set-off for which they could sue at that moment or not. The second mistake, I think, is found in the statement that the surety cannot, as against the principal creditors, set up an adverse claim of any kind. The answer is that the surety is not setting up an adverse claim against the principal creditors. What the trustees are here claiming never was distributable amongst the creditors of the bankrupt at all. I think, therefore, in the present case, on the simple ground that the right of the trustees to retain is in respect of something which at the date of the bankruptcy did not form part of the estate distributable amongst the creditors of the bankrupt, the trustees are still entitled to the right they then had.

If it were necessary for the purposes of this decision—I do not think it is—I should, as at present advised, be prepared to say that the trustees in respect of their claim are in the position of secured creditors; for their right, as expressed by the Lord Chancellor in *Cherry* v. *Boultbee* (1), seems to me to have all the characteristics of a depository lien. They have certain moneys in their hands; out of those moneys they are entitled to repay themselves a certain sum. But it is not necessary to decide that; it is enough to say that, for the other reasons which I have given, I think the trustees are entitled to retain the amount due from Arthur to the testator's estate in respect of the guarantee, and that the judgment of Astbury J. was therefore right and ought to be affirmed.

SCRUTTON L.J. A number of authorities have been cited to us in this case, which is one of considerable complication. I suppose it is

(1) 4 My. & Cr. 442, 447.

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inevitable that there should be complication, when the facts raise questions as to the relation of principal and surety, the right, whatever it is, of executors to pay themselves a debt due from a beneficiary out of his share, and the question of double proof in bankruptcy. I have had an opportunity while the case has been proceeding of considering the authorities cited, and I am very glad to be able to agree entirely in the result at which my brothers have arrived. It appears to me to be the only result consistent with common sense; but I am not quite sure that I arrive at the result in the same way as one, at any rate, of my brothers does. I think it right, therefore, to express shortly my judgment in my own way. [His Lordship stated the facts, and continued:] In these circumstances the executors said to the assignee of Arthur's share, "Before we can ascertain what your share is we must take into account the amount that Arthur owes the estate." The assignee replied, "You cannot do that, because you will be violating the rule against double proof. The creditor having claimed, you cannot claim also"; and the assignee relied on the judgment of North J. in *In re Binns* (1), which in my view decided the point in her favour.

Take the questions of law that arise one by one. First, if there were no bankruptcy, and no question of principal and surety, but an existing debt, what would be the position of the executors? A long series of authorities has decided the position in such a case; and I take the statement of law from the judgment of Swinfen Eady J. in *In re Rhodesia Goldfields, Ld.* (2): "The rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund." That followed a series of authorities, and the authority most often cited is a passage from the judgment of Kekewich J. in *In re Akerman* (3): "A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of

(1) [1896] 2 Ch. 584. (2) [1910] 1 Ch. 239, 247.
(3) [1891] 3 Ch. 212, 219.

the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back." Take a simple case when a beneficiary is given half the residue and that beneficiary owes the estate a sum. Suppose, for instance, the executors have in hand 500*l.*, but that the beneficiary A. owes the estate 500*l.*, what happens? The executors are entitled under that principle to say, "The real residue is 1000*l.*, for you must pay the 500*l.* you owe. Half 1000*l.* is 500*l.* Therefore we can give the other beneficiary B. 500*l.* in our hands and we need give you nothing, because you have to pay us 500*l.*, which we should then have to hand back to you. There is no need to go through that performance; what you get is a release of your debt." In the same way, if instead of owing 500*l.* the beneficiary A. owed 250*l.*, and the amount in the hands of the executors was 500*l.*, making 750*l.* in all, so that each beneficiary would be entitled to 375*l.*; 375*l.* would be paid to beneficiary B.; but to beneficiary A. the executors would say, "Here is 125*l.*; the other 250*l.* is, as far as you are concerned, discharged. You ought to have given it to us, and we should then have handed it back to you; it has the same effect if you take a discharge." I do not think it necessary to decide exactly what that right of the executors is. I am rather disposed to agree with Kekewich J. that it is not retainer. I have great difficulty, in spite of the dictum of the Lord Chancellor in *Cherry* v. *Boultbee* (1), in seeing how it is a lien. I do not think it is necessary for me, beyond stating the principle in the way I have done, to say what the exact legal description of the right is.

The next question is, how does the fact that the debt is a debt arising out of the relation of principal and surety affect the matter? As I understand, the law of principal and surety is worked out by having regard to three principles. (1.) The debtor must discharge the debt once, and he need not discharge it more than once. (2.) The creditor is entitled to get his 20*s.* in the pound from some one. He cannot get more than 20*s.* in the pound. (3.) The surety is not entitled to keep as against the debtor more than he has paid, or is liable to pay. If the creditor is paid in full by the surety, that does not prevent the creditor suing the debtor for the whole debt, because

(1) 4 My. & Cr. 442, 447.

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although he has received 20*s.* in the pound he has not received it from the debtor; but he can enforce the claim as trustee for the surety who has paid the 20*s.* Again, supposing the debtor has paid the surety the full amount, but owing to the surety's absconding the creditor has not received it, then, although the debtor has paid 20*s.* in the pound, the creditor can recover the amount of the debt from the debtor. If, however, the debtor pays more than 20*s.* in the pound he can get the surplus back.

To these two sets of legal principles I have mentioned it remains to add the fact of the debtor's bankruptcy, and in particular the rule in bankruptcy that there must not be a double proof for the same debt, with the further explanation that, in determining whether the two proofs are in respect of the same debt, regard must be had, not to technicalities, but to the substance, as was pointed out in *In re Oriental Commercial Bank.* (1) Bankruptcy has supervened here and the trustee in bankruptcy and the bank come to the executors and say, "Pay us the share of this beneficiary in the estate." What is there to prevent the executors exercising the right to which I have already referred and saying, "You want the share of this beneficiary in the estate, but we must first find out what the whole is of which you claim a share, and the whole includes the debt owing from this beneficiary to the estate." It is said, as I understand it, that the executors cannot exercise this right because by reason of s. 7 of the Bankruptcy Act, 1914, the only person that can exercise such a right is a secured creditor. A secured creditor is defined by s. 167 of the Bankruptcy Act, 1914, as "a person holding a mortgage, charge or lien on the property of the debtor." Speaking for myself, I am not prepared to say that this right of the executor is a mortgage, charge or lien. I do not wish finally to decide that, because the question may directly arise in other cases, but, as at present advised, I do not see how that can be called a lien. Equally, however, I see nothing in s. 7, sub-s. 1, of the Bankruptcy Act, 1914, to prevent the exercise of this right; it is not the use of a remedy against the property or person of the debtor, which the creditor is forbidden to make use of, unless he is a secured creditor. It appears to me to be simply a right to see that the person who claims a share of the testator's estate claims only the proper share

(1) L. R. 7 Ch. 99.

and to prevent his picking out only such portion of the estate as he thinks will give him a benefit and leaving out those portions which will reduce the share he would otherwise receive. I see nothing in s. 7 to prevent the exercise of this right.

Then how does the rule against double proof come in ? When one considers the principles that I have laid down—I hope correctly—governing the law of principal and surety, how in any way does it infringe the rule against double proof that, when the bankrupt claims his share, the representatives of the surety should say, " Certainly, but you must ascertain your share in the proper way " ? If in the end it turns out that the debtor has paid more than 20*s.* in the pound he will get this overpayment back from either the principal creditors or the representatives of the surety. If in the end it turns out that the creditors have got more than 20*s.* in the pound the surplus will be returned to the surety or the debtor, whichever ought to have it ; and I am quite unable to see how the rule against double proof applies to this case.

From what I have said it follows that I think the decision of North J. in *In re Binns* (1) was wrong. I agree with the reasons which have been given by the other members of the Court as to the exact grounds for saying that case was wrongly decided.

For the reasons that I have given I have come to the conclusion that the judgment of Astbury J. was right, and that it correctly works out the legal principles applicable to this case, though possibly he was, as we are not, technically bound by *In re Binns* (1), which decided the other way.

SWINFEN EADY L.J. The appeal will be dismissed with costs.

Solicitors : *Harrison, Powell & Tulk, for B. H. Vores, East Dereham ; Haslewood, Hare & Co., for Norgate & Hood, East Dereham.*

(1) [1896] 2 Ch. 584.

W. I. C.

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CORPORATION OF BRISTOL *v.* SINNOTT.

[1917 B. 347.]

Local Government—Notice to Frontagers to make up Road—Time Limit for Execution of Works—Common Form—Discretion of Local Authority—Unreasonable Time—Invalid Notice—Waiver—Memorial to Local Government Board—Estoppel—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 268.

Where a statute provides that an authority may serve a notice requiring work to be done within a time to be therein specified, the notice must specify a time within which the work can reasonably be completed, having regard to the nature of the work and all the circumstances. The least time that can be fairly and reasonably allotted for the completion of the work, being ascertained, is the least time to be inserted in the notice: there is a discretion to allow further time for the completion of the work, but not to fix any shorter time.

A local authority served a notice under s. 150 of the Public Health Act, 1875, on frontagers requiring them to execute certain works "within one calendar month from the date of the service hereof" without having exercised any discretion whatever in considering what was a reasonable time to allow for the execution of the works. The frontagers did not commence the works nor object to the validity of the notice, and after three months the local authority, without the consent of the frontagers, began the works and completed them within four months, and served on the frontagers the usual demand for payment. The frontagers thereupon presented a memorial to the Local Government Board under s. 268 of the Act appealing against the apportionment on the ground (inter alia) that the notice requiring them to execute the works within one month was unreasonable and bad, having regard to the fact that the local authority were unable to do the work themselves under four months. The Board held an inquiry and eventually intimated that they were prepared to make an order confirming the apportionment. Thereupon the frontagers withdrew their memorial with the approval of the Board. In an action by the local authority to recover payment from the frontagers of the expenses incurred in doing the works:—

Held, that the notice was bad in not specifying a reasonable time for the execution of the works, and that the local authority could not recover the expenses from the frontagers.

Held, also, that the frontagers, in standing by and doing nothing, had not waived their rights under s. 150, nor estopped themselves from objecting that the notice was bad.

Held, further, that the frontagers were not estopped by their

proceedings before the Local Government Board under s. 268 of the Act from raising the point as to the validity of the notice, inasmuch as, although the Board had intimated that they proposed to decide it against them, no order had in fact been made and the appeal had been withdrawn with the sanction of the Board.

Decision of Neville J. [1917] 2 Ch. 340 affirmed.

APPEAL from a decision of Neville J. (1)

The plaintiffs, the corporation of Bristol, were the urban sanitary authority for their district, and the defendants, G. H. Sinnott and Major H. C. Sinnott, were the owners of land abutting for a distance of about 1450 feet on a road, called Bloomfield Road, Brislington, in the plaintiffs' district. The road was not a highway repairable by the inhabitants at large. The defendants' land consisted of some seventeen plots of building land, allotment ground, and market garden land, but no buildings had as yet been erected upon it.

On March 10, 1914, the engineer of the plaintiffs, in pursuance of a resolution of the council, served on the defendants and the other owners of premises fronting Bloomfield Road a notice under s. 150 of the Public Health Act, 1875, requiring them " within one calendar month from the date of the service hereof " to execute certain works of sewering, and so on—following the terms of the section—for the purpose of making up the road.

After service of the notice correspondence ensued between the defendant G. H. Sinnott (who was a solicitor), acting on behalf of his co-defendant and himself, and the plaintiffs in which objection was taken to the works as unnecessary, but it was suggested that if the corporation would purchase part of the defendants' land for a public recreation ground they would acquiesce in the notice. The negotiations fell through. The defendants did not commence the works nor intimate any intention of doing so, and on May 29, 1914, the plaintiffs gave the defendants notice that they would do the works themselves, and on June 8, 1914, they commenced them and completed them on October 14 following. In the meantime on June 27, 1914, the defendants wrote to the plaintiffs stating that they did not acquiesce in or consent to the plaintiffs doing the works at their expense. In December, 1914, the surveyor of

(1) [1917] 2 Ch. 340.

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the plaintiffs duly apportioned the expenses incurred by them in executing the works amongst the several frontagers, and the sum apportioned to the defendants amounted to 1415*l.* 19*s.* 1*d.* Notice of the apportionment was duly served on the defendants on January 7, 1915, and they did not at any time dispute its accuracy.

On June 15, 1915, the plaintiffs served on the defendants the usual demand for payment of the 1415*l.* 19*s.* 1*d.*, and thereupon the defendants on July 5, 1915, presented a memorial to the Local Government Board under s. 268 of the Act appealing against the apportionment on the ground (amongst others) that the notice of March 10, 1914, requiring them to execute the works within one month was unreasonable and bad, having regard to the fact that the corporation were unable to do the works themselves under four months.

On November 1, 1915, the Board, by their inspector, held an inquiry, at which the defendants were represented by counsel. On November 10 the town clerk of Bristol wrote to the defendant G. H. Sinnott stating that he was prepared to recommend an arrangement whereby the payment of the 1415*l.* 19*s.* 1*d.* apportioned on the defendants should be made by equal instalments spread over a period of fourteen years from that date. On November 16 the defendant G. H. Sinnott replied making a counter-proposal. On March 29, 1916, the assistant secretary of the Board wrote to the town clerk stating that the decision of the Board was that the appellants should pay the expenses demanded by the town council, but that so much of the expenses as related to the carriageway should be payable by instalments over a period of fourteen years without any addition in the meantime on account of interest and adding that "An order will shortly be issued giving effect to this decision."

On March 30 the defendant G. H. Sinnott wrote to the Local Government Board enclosing a copy of some further correspondence which had taken place since the inquiry was held, intimating that negotiations were still going on, and stating that the plaintiffs had not yet replied to his letter of November 16, 1915. He concluded his letter by stating: "We have been patiently waiting, and we think it as well to send you a copy of the correspomdence now, before the decision is finally made by the Board." In reply the

assistant secretary of the Board on May 1 wrote that with reference to the arrangement suggested by the town clerk in his letter of the November 10: "I am to state that it is open to you to abandon your appeal and complete your negotiations with the town council if you choose to take this course in preference to leaving it to the Board to make an order on the lines indicated in their letter of the 29th March to the town council. It is requested that you will as soon as possible intimate what course you decide to adopt." On May 26, 1916, the defendant Major Sinnott's solicitor wrote to the Board stating that the appellants had determined to withdraw their memorial and abandon their appeal in accordance with the suggestion contained in the Board's letter to the defendant G. H. Sinnott of May 1, and that no order would therefore be necessary. The memorial was accordingly withdrawn, and no order was in fact made.

The defendants not having complied with the demand of June 15, 1915, the plaintiffs on February 8, 1917, issued a summons against them to obtain the usual declaration that the 1415*l.* 19*s.* 1*d.* was a charge on the land and for consequential relief. The defendants relied on the objection they had raised to the validity of the notice of March 10, 1914. The town clerk in his affidavit in support of the summons deposed: "It is common for local authorities, and has been the practice of the plaintiffs, to insert in such notices as that of March 10, 1914, 'one month' as a period in which the works are to be executed. It is well recognized by owners on whom such notices are served that such period is named more with the object of affording them a reasonable time in which to make up their minds whether to do the works themselves or (as usually happens) to leave them to be done by the local authority, than as rigidly fixing a time within which the works must be actually completed, and that considerable latitude is always allowed for the actual completion of the works in cases where the owners elect to do the works themselves." The defendant G. H. Sinnott denied any knowledge of the alleged practice deposed to by the town clerk.

The plaintiffs had not adopted the Private Street Works Act, 1892.

Neville J. held that the notice given by the plaintiffs was bad

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in not specifying a reasonable time for the execution of the works, and that the local authority could not recover the expenses from the defendants. He also held that the defendants, in standing by and doing nothing, had not waived their rights under s. 150 of the Act of 1875 nor estopped themselves from objecting that the notice was bad.

The plaintiffs appealed. The appeal was heard on October 23, 1917.

Macmorran, K.C., and *G. R. Northcote*, for the appellants. The short point in this appeal is whether the notice given under s. 150 is invalid by reason of the time specified in it being too short to enable the defendants to complete the works. Under the section it is left to the local authority to specify the time within which the works are to be completed. If the notice were given mala fide with the idea of preventing the frontager from doing the works it would no doubt be bad. The time limit specified in notices is not regarded by local authorities as of importance. The common form time limit of "one calendar month" has been adopted by them as the result of experience. It is sufficiently long to enable a frontager to make up his mind whether he will do the works himself or leave them for the local authority to do. If he decides to do the works himself and commences to do them before the local authority intervenes the local authority must allow him a reasonable time within which to complete them: *Denman* v. *Finchley Urban Council.* (1) Under ss. 23 and 36, which require that a reasonable time should be specified for the construction of covered drains and the provision of privies, it has been held that the owners may waive the requirements of the sections, and it is submitted that the same principle applies to s. 150. The appellants have not acted mala fide and have brought themselves within the terms of s. 150. The correspondence shows that the respondents never suggested to the appellants that the notice was bad. They stood by and allowed them to proceed with the work and took no objection to the notice on the ground that the time therein specified was unreasonable and insufficient. The objection to the time limit was an afterthought taken by the respondents for the first time in the memorial to the

(1) (1912) 76 J. P. 405, 407.

Local Government Board under s. 268 of the Act. They there stated as one of their grounds of appeal that the notice requiring them to execute the works within one month was unreasonable and bad having regard to the fact that the appellants were unable to do the works themselves under four months. This point was raised, amongst others, at the inquiry before the Local Government Board inspector. The Board have jurisdiction to inquire into all the circumstances and to determine whether the amount claimed is reasonable: *Reg.* v. *Local Government Board.* (1) No formal order of the decision of the Board was drawn up, but on March 29, 1916, the Board intimated that their decision was that the respondents should pay the expenses demanded by the appellants.

[SWINFEN EADY L.J. It is not the decision but the order which binds.

SCRUTTON L.J. referred to *Wake* v. *Sheffield Corporation.* (2)]

Under s. 268 of the Act the Local Government Board have power to deal with every question of liability. Any point, legal or otherwise, can be raised before them for their determination. Where a frontager takes the matter out of the hands of the magistrates and goes before the Local Government Board and the Board give their decision, that decision is binding on all parties. Having regard to the appeal to the Board in this case and to the intimation of their decision, it is submitted that the objection to the validity of the notice is not now open to the respondents. The question as to the jurisdiction of justices to enter into the question of liability after an order made by the Local Government Board was dealt with in *Seabrooke* v. *Grays Thurrock Local Board* (3), and it was there held that the order of the Board was only binding as to matters submitted to them. There is no suggestion in the letter of November 10, 1915, but that the expenses would be paid. The only question was as to the mode of payment.

[WARRINGTON L.J. You cannot get over the fact that the Local Government Board never made an order, and obviously did not regard their decision as equivalent to an order.]

The respondents now raise a new point which was taken by them for the first time in the memorial to the Board, and which

(1) (1882) 10 Q. B. D. 309. (2) (1883) 12 Q. B. D. 142.
(3) (1891) 8 Times L. R. 19.

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would have been decided against them if the order had been drawn up. They cannot now fall back on a point which they had practically given up when they abandoned their appeal. [They also referred to *Local Government Board* v. *Arlidge*. (1)]

G. C. Kingsbury, for the respondents, was not called upon.

SWINFEN EADY L.J. This is an appeal by the plaintiffs, the corporation of the city of Bristol, the urban sanitary authority, from an order of Neville J. dismissing an originating summons issued by the corporation. By the summons the plaintiffs asked to have a declaration that they, acting as the urban sanitary authority for the city of Bristol, were entitled under s. 257 of the Public Health Act, 1875, to a charge on each of certain premises comprised in the schedule for the amounts apportioned against those premises respectively. The summons is addressed to the respondents, Mr. G. H. Sinnott and Major H. C. Sinnott, and the schedule to the summons sets out some seventeen plots of land, consisting of building land, allotment ground, and market garden land. It specifies against them the various sums apportioned to them respectively, amounting in the whole to 1415*l.* 19*s.* 1*d.* The summons asks that it may be declared that the plaintiffs have a charge for those sums upon the lands so specified. When the matter came before Neville J. he came to the conclusion that the plaintiffs were not entitled to a charge, and dismissed the summons ; and it is from the order dismissing that summons that the present appeal is brought.

The short facts are these. The urban sanitary authority, the corporation, on March 10, 1914, served a notice under s. 150 of the Public Health Act requiring the respondents as frontagers within one calendar month from the date of the service of the notice to sewer, level, metal, flag, channel, and make good and provide the means of lighting part of a street called Bloomfield Road, Brislington, within the district of the local authority. We are told that the portion of the street in question is about 1450 feet in length, and therefore this notice had reference to this length of street in respect of which this work was to be done within one calendar month from the date of the service of the notice. The

(1) [1915] A. C. 120.

work was not done or attempted to be done. It was not even commenced, and the local authority waited for about three months before proceeding to do the work themselves. On June 8, 1914, they commenced to do the work themselves, and they completed it in between three and four months. The work was commenced on June 8, 1914, and completed on October 14, 1914, at a cost of which the amount that they claim by this summons against the frontagers is the apportioned part. In June, 1915, a demand was made by the local authority for payment of the amount. Within twenty-one days of the demand the respondents presented a memorial to the Local Government Board. There was an inquiry by an inspector, and before any order was made upon that memorial by the Local Government Board the appeal was withdrawn and no order has ever been made by the Local Government Board.

Under the provisions of s. 150 of the Public Health Act, 1875, power is given to the local authority that, where a street is not sewered and so on to their satisfaction, they may serve a notice on the owners or occupiers of the premises fronting, adjoining, or abutting on the street requiring them to do the work within a time to be specified in such notice. Then by a later part of the section it is provided that, if such notice is not complied with, the local authority may, if they think fit, execute the works mentioned themselves and recover the expenses so incurred from the frontagers. It will be observed that the power of the local authority to execute the works and charge the frontagers is conditional upon their having served the notice requiring the frontagers to do it and upon such notice not having been complied with. It is only in the event of the notice not having been complied with that power is given to the local authority to execute the works themselves and charge the frontagers with the amount. Then under s. 257 power is given to the local authority who "have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act" to recover them with interest in the manner there specified; and s. 268 provides that "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them . . . . he may, within twenty-one

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days after notice of such decision " (that, by a judicial construction, means within twenty-one days after a demand of the amount due from him) " address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties."

The first point taken on the hearing of the summons before the judge was that no proper notice had ever been given to the frontagers under s. 150; and if a proper notice had not been given, then the power of the local authority to do the works themselves, a power which only arises in the event of a notice not being complied with, never arose, and the demand upon the frontagers was illegal and not warranted by the statute. The notice which was given was, as I have said, one calendar month's notice. The learned judge with reference to that said it seemed to him to be perfectly clear that the month was fixed without reference to whether it was a reasonable time for the completion of the work, and that the time allowed was grossly insufficient for the purpose. The town clerk has made an affidavit, and he sets out quite fully the view of the sanitary authority with regard to the matter.

As I gather, there is no dispute at all that a month was a wholly nsufficient period for the execution of the work; it could not be done within a month, and the local authority took more than three times as long to do it themselves. The way in which the town clerk puts it is this. He says: [His Lordship read the paragraph from the town clerk's affidavit above set out, and continued:] The question was put to Mr. Macmorran, who appeared for the appellants, whether according to the construction of the statute, if the work is not completed within the time fixed by the notice, the local authority, assuming that the notice was a good one, had power to enter and do the works themselves. The answer was Yes. He said that they did not usually do so, but admitted, on the construction of the statute, that it was no answer at all to a local authority who claimed the right to enter and do the work themselves for the frontager to say " I have already commenced the works within the time and therefore your right to do them has not arisen."

The position, therefore, is this: The local authority served a notice requiring the frontagers to execute the work within a time which was not reasonably sufficient for the work to be executed, but was wholly insufficient having regard to the nature, character, and extent of the work. Is that a sufficient notice in compliance with the statute? In my opinion it is not. Where a statute provides that an authority may serve a notice for work to be done within a time to be specified in such notice it must, in order to be a valid and not an illusory notice, specify a time within which the work can reasonably be completed. The authority must consider the nature and extent of the work and, having regard to the circumstances, the time which ought fairly and reasonably to be allowed for the completion of that work. They have no discretion to fix a shorter time. When once the least time that could be fairly and reasonably allotted for the completion of the work has been ascertained that is the least time to be inserted in the notice. They have, however, a discretion to allow further time. Thus, if they are requiring work to be done which could be reasonably completed in three months it would be quite open to them to allow a frontager six months, but they could not shorten the time beyond what is reasonably necessary; and certainly they are not entitled to shorten it, as the judge has found they have done in this case, so as to give a time which is wholly insufficient for the purpose. Such a notice is an illusory notice.

I am of opinion, therefore, that the notice in this case was an insufficient notice, a notice, therefore, which was not a compliance with the statute, and a notice, therefore, which, in default of its being complied with, did not give the local authority any right to enter and complete the work themselves.

That being so, I am of opinion that the work done by the local authority was not work that, within the statute, they were entitled to do and charge the frontagers with upon the ground that the notice had not been complied with. As there was no sufficient notice it is as if no notice had been given, and they are not entitled to charge the frontagers with the amount.

Then a second question was raised. The frontagers appealed under s. 268 to the Local Government Board, and they raised the point in their memorial to the Board that the time for the execution

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of the work was insufficient; and it is said, therefore, that any decision of the Local Government Board on the subject was binding and conclusive. The plaintiffs' argument was that the "decision" of the Local Government Board was binding and conclusive. Those are not the words of the statute. The statute says that upon the memorial being presented "the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties." No "order" was ever made. What happened was this: A memorial was presented, and there was an inquiry by an inspector of the Local Government Board. Then on November 10, 1915, a letter was written by the town clerk of Bristol to the frontagers to the effect that he was prepared to recommend an arrangement of certain terms; and he gave details which he was prepared to recommend. On March 29, 1916, the Local Government Board wrote to the town clerk stating that the Board had had under their consideration the report made by their inspector, and then they announced what the decision of the Board would be: "The decision of the Board is that the appellants shall pay the expenses demanded by the town council, but that so much of the expenses as relates to the carriageway shall be payable by instalments over a period of fourteen years, without any addition in the meantime on account of interest. An order will shortly be issued giving effect to this decision." Down to that moment there was no order. Then on March 30 one of the frontagers wrote to the Local Government Board enclosing a copy of some further correspondence that had taken place since the inquiry was held, intimating that negotiations were still going on, and that the town clerk had not yet replied to his letter of November 16, 1915, and adding this: "We have been patiently waiting and we think it as well to send you a copy of the correspondence now, before the decision is finally made by the Board." Down to that point there was no order, and the frontagers were treating the decision as not being finally made. That is answered on May 1. The Board's assistant secretary says: "I am to state that it is open to you to abandon your appeal and complete your negotiations with the town council if you choose to take this course in preference to leaving it to the Board to make an order on the lines indicated in their letter . . . . to the town

council." That letter in effect says: "You are negotiating with the town council; it is open to you if you like to abandon your appeal to the Board and continue your negotiations with the town council." That course was in fact followed by the frontagers, and the consequence was that no order was made by the Board. Under these circumstances it cannot be said that there is any order within the statute binding upon the parties, because by the statute it is the order only that is made binding and conclusive on all parties. Also, upon the materials before us, it seems manifest that there is no estoppel that can affect the frontagers, and that there has been no waiver by them of any right that they have. On the contrary they have been persistent in claiming their legal rights. The memorial to the Board had to be presented, if at all, within the twenty-one days; but the presentation of a memorial within that time would not prevent a frontager from raising any legal point that he was entitled to raise in a Court of law. The provision for appeal to the Local Government Board in s. 268 begins in this way: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them." The frontagers here insist that they are aggrieved, but this is not a case in which the local authority are empowered to recover in a summary manner any expenses. The frontagers say that the provisions of the statute have not been complied with, and, if so, it is not a case in which the local authority are empowered to recover the expenses at all. In any case there is no waiver. There is no estoppel, and there is no order by the Board; and I fail to see anything that prevents the frontagers raising by way of defence to the application by the local authority for a charge on their land the contention that the local authority have not brought themselves within the terms of the statute seeing that they have not served a proper or sufficient notice, and therefore that they have no power to do the work themselves upon the terms of charging the frontagers with the cost.

For these reasons I am of opinion that the local authority fail to make out the claim which they come to the Court to enforce, namely, that they are entitled to a charge on the property. The

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frontagers are entitled to resist their claim on the ground that they have not brought themselves within the statute; and in my opinion there is no provision in the statute which in this case excludes the jurisdiction of the Court and prevents the Court entertaining the defence of the frontagers and considering whether it is a valid defence.

The point that the Court has no jurisdiction, and that the frontagers must go to the Local Government Board, is without foundation, and the defence they have set up is a valid defence to the claim by the local authority.

I am of opinion that the judgment of the judge below was right, and that the appeal fails.

WARRINGTON L.J. I am of the same opinion and have nothing to add.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors: *Robins, Hay, Waters & Hay, for E. J. Taylor, Bristol; Lowndes & Son, for G. H. Sinnott, Bristol.*

W. I. C.

TOZER *v.* VIOLA.

[1917 T. 326.]

C. A.
1917
ASTBURY J.
July 12, 13.
C. A.
Nov. 13, 14.

Emergency Legislation—Lessor and Lessee—Assignment of Lease—Assignee becoming Soldier—Leave to determine Tenancy—Tenancy determined—Effect on Lessee's liability—Courts (Emergency Powers) (Amendment) Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 13), *s.* 2—*Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 23.

By s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916: "Any officer or man of His Majesty's forces who is the tenant of any premises under a tenancy from year to year, or for any longer period, may apply to the county court . . . . for leave to determine such tenancy, and, upon any such application being made, the Court may, in its absolute discretion, after considering all the circumstances of the case, and the position of all the parties, by order authorize the applicant to determine the tenancy by such notice and upon such conditions as the Court thinks fit, and thereupon such tenancy may, notwithstanding any provision in the tenancy agreement or lease, be determined accordingly."

The assignee of a lease having become a soldier determined his tenancy by leave obtained under the above section. The lessor was the only other party to the application. The order of the county court provided (inter alia) that nothing in the order contained should affect any question as to the respective rights and liabilities of the lessor and lessee in respect of the premises under the lease and assignment. In an action brought by the lessee against the lessor for a declaration that as from the date of the order of the county court the lease and the term and tenancy thereby created had been determined, and that the lessee was discharged from all future liability under the covenants therein contained:—

Held (reversing the decision of Astbury J.), that the term had not been determined, and that it was not open to the lessee to claim the benefit of the order of the county court, which in terms provided that it was not to affect his rights or liabilities, which therefore continued.

The county court judge to whom an application is made under s. 2 of the Act for leave to determine a tenancy should, before making an order, satisfy himself that notice of the application has been given to and served upon all parties having or claiming an interest in the premises which are or may be affected by the proposed order.

Per Swinfen Eady L.J.: The purpose of the Act of 1916 being to relieve officers and men serving in His Majesty's forces from the burden of subsisting tenancies, no further effect should be given to s. 2 than the words require except so far as may be necessary to effect that purpose.

Principle of construction laid down by Lord Cairns in *Hill* v.

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East and West India Dock Co. (1884) 9 App. Cas. 448, 454, with reference to the disclaimer section (s. 23) of the Bankruptcy Act, 1869, applied.

Quaere, whether, notwithstanding the determination by an assignee of a lease of his tenancy in pursuance of leave obtained under s. 2 of the Act, he still remains liable for the rent either directly or upon his covenant to indemnify the original lessee.

ACTION.

By a lease dated August 31, 1906, certain premises in Brook Street, Hanover Square, were demised by one Rudall to one Pritchard for a term of twenty-one years from Midsummer, 1906, at a yearly rent of 350*l.*

By a deed dated December 19, 1906, Pritchard assigned the lease of the same premises to Otto Franc Viola for the residue of the term of twenty-one years.

By sub-lease dated June 5, 1907, Viola (herein called the lessor) sub-demised the same premises to William Charles Tozer (herein called the lessee) for twenty and a quarter years (less ten days) from March 25, 1906, at a yearly rent of 500*l.* The lessee covenanted to pay the rent and perform the repairing and other covenants during the said term. He also covenanted not to assign without the lessor's licence. The lease was determinable by either party at the end of the seventh or fourteenth years of the term on six calendar months' notice.

By a deed dated July 29, 1908, the lessor mortgaged (inter alia) his leasehold interest in the same premises to one Acland for the unexpired portion of the twenty-one years less one day, subject to and with the full benefit of the existing sub-lease, to secure the repayment of 5000*l.* with interest.

By a licence to assign dated September 26, 1910, and made between the lessor of the first part, the lessee of the second part, and the assignee, Maurice Spero, of the third part, the lessor gave the lessee licence to assign the premises to the assignee for the residue of the term, subject to the rent and covenants. The licence was not to affect the lessor's rights in respect of the covenants contained in the lease. The assignee covenanted with the lessor to pay the rent and perform the covenants during the residue of the term.

By an assignment dated September 27, 1910, the lessee, in consideration of 200*l.*, assigned the premises to the assignee for the

residue of the term subject to the rent and covenants, and the assignee covenanted to pay the rent and perform the covenants during the residue of the term and keep the lessee indemnified in respect thereof.

The assignee having become a soldier on February 21, 1917, applied to the Marylebone County Court for leave to determine his tenancy under the Courts (Emergency Powers) (Amendment) Act, 1916. (1) The lessor was made a party to the application, but neither the lessee nor the mortgagee was made a party.

By an order dated March 5, 1917, specifically referring to the lease, assignment, and licence, the county court gave the assignee liberty to determine his tenancy on the terms (1.) that the assignee should pay certain arrears of rent, and should pay the quarter's rent which would accrue on March 25, 1917, and (2.) that "Nothing in this order contained shall affect any question as to the respective rights and liabilities of the respondent (Viola) and the said William Charles Tozer in respect of the premises under the hereinbefore-mentioned lease, assignment, and licence respectively."

It was admitted that as between the lessor and the assignee the tenancy was determined under and by virtue of this order on March 25, 1917, and that on April 1, 1917, the assignee quitted the premises, which were now derelict. The lessor, however, contended that as between himself and the lessee the term was still subsisting and that the lessee was liable to pay the rent and perform the covenants during the residue of that term.

On April 16, 1917, the lessee commenced this action against the

(1) The Courts (Emergency Powers) (Amendment) Act, 1916, provides as follows:—

Sect. 2: "Any officer or man of His Majesty's forces who is the tenant of any premises under a tenancy from year to year, or for any longer period, may apply to the county court, or in Scotland the sheriff court, for the district in which he usually resides, or in which such premises are situate, in such manner as may be prescribed by rules or directions under the principal Act, for leave to determine such tenancy, and, upon any such application being made, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order authorise the applicant to determine the tenancy by such notice and upon such conditions as the court thinks fit, and thereupon such tenancy may, notwithstanding any provision in the tenancy agreement or lease, be determined accordingly."

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lessor alone for a declaration that as from March 25, 1917, the lease and the term and tenancy thereby created had been determined, and that the lessee had been discharged from all further or future liability under the covenants therein contained.

The action came on for hearing before Astbury J. on July 12, 13, 1917.

Giveen, for the lessee. Determination of the tenancy is equivalent to determination of the lease or term: Key and Elphinstone's Precedents, 10th ed., vol. i. p. 885. The term is ended, the reversion accelerated, and the lessee's liability gone: *Baynton* v. *Morgan* (1); *Stacey* v. *Hill* (2); *Hastings Corporation* v. *Letton*. (3)

Any other view leads to absurd results. The assignee having given up all interest in the property would be liable to indemnify the lessee during the whole term, which the lessee, having no interest, would have no right to determine at the end of the fourteenth year, i.e., 1920. The statutory relief would be a mere mockery. Again, suppose the lessee had taken a new leasehold house and he and the assignee then became soldiers. The lessee could not get relief for his original house, because he is no longer a tenant. The assignee could get nominal relief, but he would be liable to indemnify the lessee, and the Act passed for the relief of soldiers would relieve neither. If the Act intended to leave the lessee still liable it would have enabled him to obtain a vesting order.

The bankruptcy decisions to the effect that a lessee remains liable notwithstanding disclaimer by his assignee's trustee in bankruptcy are clearly distinguishable. In *Manning* v. *Flight* (4) the Bankruptcy Act, 1825 (6 Geo. 4, c. 16), s. 75, did not determine the lease at all, but merely provided that it should be delivered up to the lessor. Again, *Hill* v. *East and West India Dock Co.* (5) turned on s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). That section in terms provided that the lease should be "deemed to have been surrendered," but as the lessee could obtain a vesting order, and any person injured could prove in the bankruptcy, the Courts were enabled to hold that the fictional surrender did not affect third

(1) (1888) 22 Q. B. D. 74, 78.
(2) [1901] 1 K. B. 660, 664.
(3) [1908] 1 K. B. 378.
(4) (1832) 3 B. & Ad. 211.
(5) 22 Ch. D. 14; 9 App. Cas. 448.

parties, whose rights were preserved by the section, and, indeed, in considering whether leave to disclaim should be given, their interests were not considered : *Ex parte East and West India Dock Co.* (1)

The present section is entirely different. The position of all parties is to be considered before leave is given, there is no provision for a vesting order, and no provision enabling an injured party to sue any one. The proviso to the order does not purport to, nor could it in fact, create any rights against the absent lessee. It leaves the matter entirely open.

Hon. Frank Russell, K.C., and *J. W. Manning*, for the lessor. The Act was obviously intended to operate as between the landlord and the soldier tenant only, and not to affect the rights or liabilities of third parties. The lessee therefore remains liable on his covenants in just the same way as if the lease had been disclaimed by an assignee's trustee in bankruptcy : *Smyth* v. *North* (2) ; *Ex parte Walton.* (3) The latter case cites Co. Litt. 338b to the effect that as regards third parties the estate hath in consideration of law a continuance. It is on this principle that, in considering whether leave to disclaim should be given, the interests of third parties are disregarded : *Ex parte East and West India Dock Co.* (1) The continuing liability of the lessee, notwithstanding disclaimer by his assignee's trustee in bankruptcy, was subsequently affirmed in *Harding* v. *Preece* (4) and *Hill* v. *East and West India Dock Co.* (5), which was the last decision on the Bankruptcy Act, 1869, s. 23. In *Stacey* v. *Hill* (6) the lessee's trustee in bankruptcy disclaimed, and it was held that his surety was released, as otherwise he would have had a right of indemnity against the estate. This right to indemnity brought the surety within the exception to the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 2, which provides that a disclaimer shall not, " except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability," affect the rights or liabilities of any other person. The Emergency Act cannot be read literally, as the destruction of the term would destroy the rights of a mortgagee or underlessee.

(1) (1881) 17 Ch. D. 759.
(2) (1872) L. R. 7 Ex. 242.
(3) (1881) 17 Ch. D. 746, 749.
(4) (1882) 9 Q. B. D. 281.
(5) 22 Ch. D. 14; 9 App. Cas. 448.
(6) [1901] 1 K. B. 660, 664.

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[ASTBURY J. The judge ought to have them before him, consider their position, and impose conditions.]

It is unnecessary to treat the lease as surrendered. The section can be satisfied by treating the term as assigned over to a nominee on behalf of all parties other than the assignee, leaving their mutual rights and liabilities unaffected. The second proviso to the order expressly preserves these rights and liabilities. Even if the lessee's right of indemnity exists it cannot be enforced during the war: Courts (Emergency Powers) (Amendment) Act, 1916, s. 1.

Giveen, in reply, referred to *In re Mercer and Moore*. (1)

ASTBURY J. (after stating the facts). The lessee contends that the lease and the tenancy thereby created have been determined, and that he is in consequence discharged and released from all further or future liability under the covenants. The lessor, on the other hand, contends that the effect of the order was to determine the tenancy as between the lessor and the assignee only, leaving the lessee still liable under his covenants and leaving the lease and the term as between the lessor and the lessee unaffected.

Before dealing with the arguments and the authorities cited I propose to express my own view as to the meaning and operation of this Emergency statute. It is quite obvious that the section was passed for the purpose of relieving soldiers from onerous liabilities. It is equally obvious that a person can be a tenant of premises for a longer period than a year, either as direct lessee or as assignee or sub-lessee. Therefore any soldier who is an assignee of the unexpired residue of the term of a lease may apply to the county court for leave to determine that tenancy, the tenancy being in that case the whole residue of the term of the lease. Differing from the various provisions of the Bankruptcy Acts with regard to disclaimer, this section goes on to provide that the Court, after considering all the circumstances and the position of all the parties—that, I presume, means all the parties interested in the question—may by order authorize the tenant soldier to determine the tenancy upon such conditions as the Court thinks fit.

I do not understand how the county court can consider the position

(1) (1880) 14 Ch. D. 287.

of all the parties interested in the question, unless they are summoned and given an opportunity of being heard with regard to their rights. However, in the present case the county court judge, with the fact before him that the tenant soldier was an assignee of a considerable residue of an unexpired term at a heavy rent, in an application to which the lessee was not made a party, made an order that the assignee should be at liberty to determine the tenancy, and the only condition affecting the lessee was that nothing in the order should affect any question—I presume that means if there be any question—as to the respective rights and liabilities of the lessor and lessee.

It is admitted that, as between the lessor and the assignee, the tenancy was determined on March 25 last. The question is whether the order having been made and the tenancy having so determined, the lessee still remains liable under his covenants, he having no longer any estate or interest in the property, and there being no statutory provision by which he can recover or obtain possession of the premises in respect of which it is suggested he remains liable to pay the rent and perform the covenants.

If the lessee still remains liable under his covenants this order has not only not relieved the soldier assignee from his liability, but, after destroying his interest in the property, it has left him with an exactly equivalent liability; because under the assignment he is liable by express covenant, as indeed he would be by implied covenant, to indemnify the lessee in the event of his being called upon to pay the rent. The only result, therefore, of the lessor's contention is that, by means of this order the assignee has ceased to have any interest in the property, but is liable to indemnify the lessee against the rent and covenants. Having regard to the fact that the Legislature must be presumed to have known that a tenant may be a tenant by assignment as well as a direct lessee, I cannot believe that any such result was intended by the framers of the Act.

The lessor's main contention is based on a long series of authorities under the various Bankruptcy Acts up to and including the Bankruptcy Act, 1869, under which it has been held that, notwithstanding the disclaimer of a lease by the assignee's trustee in bankruptcy, the lessee still remains liable under the lease, although s. 23 states that it shall be "deemed to have been surrendered."

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The principal authorities are *Smyth* v. *North* (1), *Ex parte Walton* (2), and *Hill* v. *East and West India Dock Co.* (3) They have all been carefully dealt with before me, and the conclusion that I have come to upon them is that, for the special and particular reasons adduced by the various judges who dealt with those cases, they were driven to construe what they considered the ambiguous language of s. 23 for the purpose of giving effect to what they held to be the plain intention of the Legislature. In those cases it was not disputed that prima facie the determination of the term vested in an assignee would have released his assignor lessee, and in the ordinary course would have accelerated the lessor's reversion; but, having regard to the ambiguity of the language of s. 23 and the judges' view as to the clear intention of the Legislature, the Courts were enabled to put a modified construction upon language at first sight apparently plain, especially having regard to two facts: the first being that the Act gave the lessee the opportunity of obtaining possession of the premises which had been vested in the bankrupt assignee; and, secondly, the statute provided no means by which third parties could be heard on the question whether leave to disclaim should be given.

In the present case I see no ambiguity in the expression "determine the tenancy." The assignee of a lease cannot determine the tenancy effectively without determining the term or lease with which it is synonymous. If the term is determined, then prima facie there is no further liability upon the original lessee's assignor to pay any further rent; the lessor's interest is accelerated, he becomes owner in possession, and there is no means of any sort or kind provided under which the lessee, if still liable on his covenants, can recover possession of the property, or bring ejectment against any stranger in possession.

The lessor contends that, in the absence of some special provision in that behalf the rights and liabilities of third parties ought not to be affected by a provision prima facie intended to operate as between the landlord and tenant only. The answer is that, unlike the Bankruptcy Act, 1869, this section expressly provides that the position of such third parties is to be considered, and if an order is made in

(1) L. R. 7 Ex. 242. (2) 17 Ch. D. 746.
(3) 22 Ch. D. 14; 9 App. Cas. 448.

the presence of an assignee and lessor without the lessee or any other third party, such as a mortgagee, being summoned and heard before the Court, I do not think that the lessor is entitled to say that the position of that third party remains unaffected. The object of the section is that the third party's position, liability and interest is to be considered and dealt with, and if the lessor, as in this case, chooses to allow an order to go in the assignee's favour without insisting upon the lessee's position being taken into consideration it is so much the worse for him.

This being so, I do not feel at liberty to cut down the clear language of this section in a case where so to do would not carry out, but defeat its main object. It cannot have been intended that an assignee tenant should be relieved of his tenancy with the absurd result that after losing his interest in the property, whatever it may be worth, he should still remain liable to indemnify the lessee for the rest of the term in respect of the rent.

Lastly, the lessor very naturally called my attention to the extraordinary result that might happen if a lessee soldier who had mortgaged his interest in the term applied under the section contending that, if my view is right, the determination of the tenancy would destroy the mortgagee's security without giving him any means of preventing that injustice. The answer is that it is the duty of the Court, in making orders under this section, to see that the rights of third parties, including mortgagees, are considered and safeguarded. In the present case, subject to the true meaning and effect of the second proviso, that was not done.

The only remaining question, therefore, is whether the second proviso, that nothing in the order should affect any question as to the respective rights and liabilities of the lessor and lessee, safeguards their respective interests. I do not think that that is the meaning of the proviso. It merely provides that no question as to the rights or liabilities of these parties shall be affected. If there be a question, it remains open and unaffected. If there be no question, the proviso does not create one. The real truth of the matter is that the order gave the assignee liberty to determine his tenancy, and it was determined accordingly. That being so, no proviso of this sort can prevent the determination of the tenancy having its legal operation.

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The action succeeds, and the lessee is entitled to the declaration he claims.

The order as drawn up was as follows: "This Court doth declare that as from the 25th March, 1917, the indenture of lease dated 5th June, 1907, in the pleadings mentioned and the term thereby created have been determined, and that the plaintiff has been discharged from all further or future liability under the covenants therein contained."

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The lessor appealed. The appeal was heard on November 13, 14, 1917.

Hon. Frank Russell, K.C., and *J. W. Manning*, for the lessor.

Cunliffe, K.C., and *Giveen*, for the lessee.

The arguments were substantially the same as those in the Court below. The following additional cases were cited:—*In re Monolithic Building Co.* (1), *Grey* v. *Pearson* (2), and *Ex parte Budden and Roberts.* (3)

SWINFEN EADY L.J. This is an appeal of the defendant Viola from an order of Astbury J. dealing with a matter which has arisen under the Courts (Emergency Powers) (Amendment) Act, 1916. The facts leading up to the proceedings before the judge in the Court below were very simple, and they were these: [His Lordship, after stating the facts and observing that it was clear on the face of the order of the county court judge that it was present to his mind that the applicant was the assignee of the lease, and that, although the lessor was present, the lessee, the assignor to the applicant, was not present, and reading s. 2 of the Act, continued:] What is there that the plaintiff, Tozer, relies upon in saying that the lease has been determined, and that he has been discharged from liability to the defendant? Simply the order of the county court judge and the notice assumed to have been given by the tenant thereunder determining his tenancy. But the order of the county court judge was made upon terms, and one of those terms was that "Nothing in this order contained shall affect any question as to the respective

(1) [1915] 1 Ch. 643. (2) (1857) 6 H. L. C. 61, 106.
(3) (1879) 12 Ch. D. 288.

rights and liabilities of the respondent and the said William Charles Tozer in respect of the premises under the hereinbefore mentioned lease, assignment and licence respectively."

In my judgment it is not open to Tozer to claim the benefit of an order as terminating his liability to Viola, which in terms contains the statement that nothing in it is to affect the question of his liabilities to Viola under the lease. The whole foundation of Tozer's claim is that, under and by virtue of this order and the notice determining the tenancy given in pursuance of it, he has been discharged from all further liability. The Act gives wide powers to the county court judge; it says: "The Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order authorise the applicant to determine the tenancy by such notice and upon such conditions as the Court thinks fit." I am of opinion that the section confers the fullest jurisdiction upon the county court judge in considering the matter in his absolute discretion to impose conditions; but the county court judge ought to take care that notice of the application is given to and served upon all parties who are or may be affected by any order that he proposes to make—that is to say, upon any parties having or claiming an interest in the premises which may be affected by the order which he is about to make. In my judgment both the mortgagee of the lease and Tozer as the original sub-lessee, who at that moment remained liable to Viola on the sub-lease, ought to have had notice of the application. I trust in all further applications under s. 2 of the Act a notice will be served on all parties interested. However, that step was not taken in the present case, and we have to consider now what the effect is of the order made by the county court judge.

In my opinion the principle enunciated by Lord Cairns in *Hill* v. *East and West India Dock Co.* (1) has a bearing upon the present case. What was the purpose of this statute? Its obvious purpose was to relieve officers and men serving in His Majesty's forces from the burden of subsisting tenancies, on their having to leave their work, or farm or premises, and engage in war, by allowing them to bring their tenancies to an end and so relieve them from the anxiety of their obligations under the tenancy agreements. That is the

(1) 9 App. Cas. 448, 454.

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manifest purpose of this Act; and in construing the statute no further effect should be given to it than the words require except so far as is necessary to achieve the purpose of the Legislature. It was an analogous statute that Lord Cairns was dealing with in *Hill* v. *East and West India Dock Co.* (1), where the question was as to the effect of the disclaimer of a lease by a trustee in bankruptcy under the Bankruptcy Act, 1869. Under s. 23 of that Act the trustee in bankruptcy could by writing under his hand disclaim onerous property, and if the property disclaimed was a lease, then the section provided that the lease should be deemed to be surrendered on the date of the order of adjudication. The question arose in that case whether the disclaimer only determined the lease as regards the bankrupt, who was the assignee of the lease, or whether it also determined it as between the lessor and the original lessee. That being the question, Lord Cairns stated the principle to be applied in the following terms: "It being an onerous lease, the present appellant contends that the effect of the 23rd section of the Bankruptcy Act is this, that not only have the trustee of the bankrupt and the bankrupt himself been delivered from the obligations of that lease, but that the lease is to all intents and purposes destroyed and put an end to, and that notwithstanding his original responsibility to the lessors for the rent and the other covenants he is now perfectly free, and that the lessors have no recourse against him either for the rent or upon the covenants. Well, of course that may be so, an Act of Parliament may have stepped in and produced consequences of that kind; but it is obvious at the outset that if we find in an Act of Parliament a provision of that kind in words which cannot be interpreted otherwise, it is a very strong provision, and it is difficult to see upon what principle it can have been enacted by Parliament—although Parliament has the power to enact it—that a solvent man who has entered, with his eyes open, into a covenant with the owners of property to pay rent to them and to be liable to them for that rent and for other covenants, and who upon an assignment has recognised that liability and has stipulated that it shall continue, shall nevertheless be delivered from that liability, not by reason of anything which has passed between him and the lessors, but from a misfortune which has happened to the lessors, namely that the person

(1) 9 App. Cas. 448, 454.

to whom the lease has been assigned has become a bankrupt." The House of Lords held that, notwithstanding the words of the statute "shall be deemed to have been surrendered," and although the bankrupt assignee was relieved from any further liability, the lease remained as between the lessor and lessee.

It is exactly the same position that Tozer is seeking to take up in the present case. Although there is a lease by Viola to Tozer, under which Tozer has covenanted to pay rent and perform covenants, and although nothing has happened as between those two parties to prevent Tozer remaining liable, yet it is said that by reason of the tenancy of the assignee having been determined Tozer is relieved from all liability under the lease. In my opinion that is not so. The present statute provides that the man who is the tenant of any premises may apply and then the Court may authorize the applicant to determine the tenancy upon terms. Having regard to the terms that are embodied in this order, I am satisfied that the liability of lessor and lessee as between themselves continues; the lessee remains liable to the lessor and the order sanctioning the termination of the tenancy has not the effect which is contended for it. It has not released the original sub-lessee from his liability to the original sub-lessor.

Mr. Giveen suggested that the consequence of the notice was that, although the tenancy was determined by Spero, nevertheless Spero remained liable upon his covenant to indemnify the original lessee. Spero is not before the Court, and that question does not now arise; but I wish to guard myself against it being thought that I am giving any encouragement to the view that Spero remains liable for the rent either directly or upon his covenant to indemnify. Spero not being a party to the present litigation, I say nothing further in regard to that. I am of opinion, therefore, that the order below ought to be discharged and that there ought to be a declaration to the contrary effect.

WARRINGTON L.J. I am of the same opinion. The persons whose position inter se comes into question in this case are, first, Viola, the lessor of the premises under a lease dated June 5, 1907; secondly, Tozer, the lessee of the same premises under that lease, which contained covenants by Tozer to pay the rent and perform

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certain other obligations specified in the lease; and, thirdly, Spero, the assignee from Tozer of the lease, who in the assignment covenanted to pay the rents and perform the covenants during the term and to keep Tozer indemnified against liability under the lease. The question, and the only question, we have to determine is whether, in the events which have happened, Tozer is relieved from his obligation under the lease to pay the rent and perform the covenants contained in the lease. [His Lordship stated the facts and read the material parts of s. 2 of the Act of 1916, and continued:] There is an express provision in the order of the county court judge giving authority to determine the tenancy that nothing contained in it "shall affect any question as to the rights and liabilities" of Viola and Tozer. One of the liabilities of Tozer is to pay the rent and perform the covenants, and one of the rights of Viola under the lease is to require payment of the rent and the performance of the covenants; and the express provision of the order is that "Nothing herein contained shall affect any question as to" those rights and liabilities. It seems to me that the effect of this provision is that if Viola, asserting his right to receive rent, demands the rent from Tozer, and on payment being refused sues Tozer, then this order is not to affect his right to require judgment in his favour for payment of that rent. It is said, however,—and this is really the only way in which the argument can be put—that this order went beyond anything which the Act of Parliament allowed to be done, because all that the Act of Parliament authorized was that leave should be given to determine the tenancy; and Tozer contends that the result of determining the tenancy is to determine the whole term, and that such determination in itself puts an end to the right to recover rent in respect of the term, so that the condition imposed by the order is nugatory because it makes the order contradictory in itself. My answer to that is that, in my opinion, the order as made is authorized by the Act of Parliament. The Act empowers the Court to make an order authorizing the soldier to determine the tenancy, that is, to determine his tenancy, the relationship under which he holds certain premises, and is liable to pay rent for them and to observe the covenants in respect of them; and it empowers the Court to do that upon such conditions as the county court judge thinks fit. It is not merely that the Court is to be able to impose such terms upon the

soldier as it thinks fit, but the Court may make the order upon such conditions as it thinks fit. If the county court judge thinks fit to authorize the determination of the tenancy upon condition that nothing shall be determined except the right of the soldier to hold the premises and his liability to pay the rent and perform the covenants as between himself and the landlord, I can see no reason why such an order should not be within the powers conferred by the Act, which are in extremely wide terms. In my opinion, therefore, the fact, or rather the assumption, that the determination of the tenancy means, and can only mean, the determination of the whole term begs the whole question. I think this Act of Parliament does authorize the county court judge to determine the soldier's tenancy without necessarily determining the term as between other persons, and that the order in this case has so partially determined the tenancy.

I should like to add two things. First, having regard to the very wide powers given to the county court judge of affecting the rights and the position of parties who may be interested in the premises subject to the tenancy in question, it is eminently desirable that the county court judge should have before him on any application under s. 2 of this Act all those parties so that he may hear what they have to say, and, after hearing what they have to say, settle the conditions upon which the soldier's application should be acceded to.

Secondly, the learned judge has assumed—and it has been asserted here as an irrefutable proposition—that the order of the county court judge and the Act of Parliament on which it is founded could not, unless such a construction is given to the Act as that for which the respondent contends, relieve the soldier from his covenant as assignee to indemnify the original lessee against the rent and covenants contained in the lease. I do not propose to express any opinion as to that—because we have not the necessary parties before us—beyond saying that, in my opinion, there is no foundation for the assumption that any such question must necessarily be determined in favour of the person who insists on the continuance of the indemnity. I think under the circumstances of this case Tozer, who was originally liable under the lease to pay this rent and perform these covenants, has not been relieved from that liability by anything that has taken place.

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SCRUTTON L.J. If it were necessary in my judgment to pronounce any opinion upon the meaning of the Act which has been before us, the exact limitations to be placed upon the words "determine the tenancy," and the extent to which the reasoning applied to the Bankruptcy Act, 1869, in a case of disclaimer is also applicable to this Act, I should have desired to take further time in order to consider carefully my judgment. But in my view this case can be decided on a very short and simple point. Viola had an interest in certain premises and leased them to Tozer, who assigned his interest to Spero on a covenant by Spero to fulfil the obligations of the original lease; and on March 1, 1917, it is quite clear and admitted that Tozer was still under obligations to Viola under the terms of the lease. On April 16, 1917, Tozer issued a writ asking for a declaration that he had been discharged from that liability, and, when asked on what ground he says that liability admitted on March 1, 1917, has been determined, relies upon the order of the county court authorizing the termination of the tenancy. The county court judge had power to make an order authorizing the termination of the tenancy by Spero on such conditions as in his absolute discretion he might think fit; and, on looking at the order on which Tozer relies, I find that the condition on which Spero has been allowed to terminate his tenancy is that nothing in this order contained shall affect any question as to the respective rights and liabilities of Viola and Tozer in respect of the premises. The plaintiff is therefore seeking to affect his admitted liability by an order which on the face of it says that nothing in it shall affect that liability. That simple consideration, to which I could not find that counsel for the respondent were able to give any answer, appears to me to decide this case.

I do not desire to express any opinion as to the effect of terminating a tenancy on the application of the assignee of a lease, upon the covenants of that assignee to indemnify the original lessee. That question may come before the Court in some other case. I must not be taken to assent at present to the view put forward by Mr. Cunliffe and Mr. Giveen that it is too clear for argument that it does not free the assignee from liability under his covenants; and I must not be taken to express any opinion, if Spero says he is freed from his covenants for indemnity under the order of the county court judge,

on the effect of his not having brought Tozer before the county court judge when the order was pronounced.

On the very short and simple ground which I have stated I hold that the learned judge below was wrong.

SWINFEN EADY L.J. The form of order will be this: "Allow the appeal, discharge the order below and substitute a declaration that, notwithstanding the order of the Marylebone County Court judge in the pleadings mentioned and the determination of the tenancy of Maurice Spero, the plaintiff as lessee under the lease of June 5, 1907, remains liable to the defendant as lessor for the payment of the rent thereby reserved and the performance of the covenants and conditions therein contained."

Appeal allowed.

Solicitors: *J. J. Edwards & Co.; Harris, Chetham & Cohen.*

W. I. C.

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In re FFENNELL'S ESTATE.
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[1917 F. 315.]

Settlement—Conversion—Trust for Sale with the Consent of Tenant for Life—Election—Reconversion.

By marriage settlement made in 1886 real estate of the wife was assured to trustees upon trust, with the consent in writing of the wife and husband during their joint lives, and of the survivor during her or his life, and after the death of the survivor, at the discretion of the trustees, to sell the same and invest the proceeds of sale and pay the income of such investments, or the rents and profits until sale, during the joint lives unto the wife without power of anticipation, and after the death of either of them to the survivor during his or her life, and after the death of such survivor to hold the said trust premises and the income thereof upon usual trusts in favour of the children of the marriage, and in default of children (which happened) in trust for such persons as the wife should when discovert by deed, or whether covert or discovert by will, appoint, and in default of appointment upon trust, if the wife should survive the husband

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(which happened), for the wife. The deed contained a usual agreement for the settlement of the other or after-acquired real or personal property of the wife, the same to be assured to the trustees upon trust for sale, with power nevertheless to retain the same, but so that the property remaining unsold should be deemed personal estate and devolve as such. In 1891 and 1895 certain copyhold land and an undivided share of real estate became subject to the agreement to settle after-acquired property. By her will made in 1908 the wife, after reciting her power of appointment under the settlement, in the event of there being no children of the marriage appointed the "hereditaments, premises, property and estate" which at the time of her death might be comprised in and subject to the settlement to her husband, "his heirs, executors, administrators and assigns," for his absolute use and benefit; and also devised and bequeathed to him the residue of her real and personal estate. The husband died on December 3, 1916, and the wife died on December 7, 1916. There was no issue of the marriage. No part of the real estate comprised in or subject to the settlement had ever been sold. On a summons raising the question whether the real estate devolved as real estate or as personal estate of the wife:—

Held, that the requirement of the consent in writing of the tenants for life did not prevent the trust for sale from being an imperative trust, and that the settlement operated as a conversion in equity of the real estate into personalty.

Held, also, that the wife's will, in the events which had happened, was no evidence of an election by her to take the property as unconverted, and that in the absence of any evidence of such election by her the property devolved as part of her personal estate.

In re Lord Grimthorpe [1908] 2 Ch. 675 considered.

ADJOURNED SUMMONS.

By the settlement, dated October 2, 1886, made on the marriage of Jane Georgiana Bowater and William Edward Ffennell, real property of the wife, consisting of a freehold house in Bayswater and one undivided fourth share of an estate at Woolwich in the county of Kent (which estate was being administered by the Court in a Chancery action), was conveyed to trustees in fee simple upon trust "with the consent in writing" of the wife and husband during their joint lives, and of the survivor of them during her or his life, and after the death of such survivor at the discretion of the trustees or trustee, to sell the said hereditaments and premises and invest the proceeds of such sale in manner therein mentioned, and to pay the income of the trust premises, or the rents and profits thereof or any part thereof until sold, during the joint lives of the husband and wife unto the wife for her separate use without power of anticipation,

and after the death of either of them to the survivor during his or her life, and after the death of such survivor to hold the said trust premises and the income thereof upon usual trusts in favour of the children of the marriage; and in the event (which happened) of there being no child of the marriage in trust for such persons and purposes and in such manner as the wife should when discovert by deed, or, whether covert or discovert, by will or codicil appoint, and in default of and subject to any such appointment upon the trusts following—that is to say, if the wife should survive the husband (which happened) in trust for the wife, but if the husband should survive the wife then on the usual trust for the wife's statutory next of kin. And it was thereby agreed that, if the wife then was, or if during the said intended coverture she or the husband in her right, or if after her death the husband in her right, should at one time and from one source become seised or possessed of or entitled to or have an absolute power of disposition of any real or personal property of the value of 200*l.* or upwards for any estate or interest, then and in every such case the husband and the wife and all other necessary parties should at the cost of the trust estate as soon as circumstances would admit do all such acts and things as should be necessary or expedient for effectually vesting the same in the trustees or trustee, upon trust that they or he should in such manner as they or he should think fit (but as to reversionary property not until it should fall into possession, unless it should appear to them or him that the trust estate would probably be injured by deferring the sale) sell or call in and convert into money so much of the said property as should not consist of money or investments of a nature thereinbefore authorized, and should stand possessed of the net moneys produced by such sale, calling in, and conversion and of so much of the said property as should consist of money or of such investments as aforesaid, and of the income thereof respectively, upon the trusts (including the trust for investment) thereinbefore declared concerning the trust premises thereinbefore expressed to be thereby assigned; and it was thereby expressly agreed and declared that the said trustees or trustee might retain the said trust premises or any part thereof unsold for so long as they or he should think proper, 'but that the same so remaining unsold shall be deemed personal estate and devolve as such."

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Under the will of her mother, who died in 1891, the wife became entitled to some copyhold land which became subject to the trusts of her after-acquired property contained in the settlement, and in 1895 she became entitled in possession to one undivided fourth share of another real estate, also situate at Woolwich, which share became subject to the same trusts and had been duly assured to the trustees.

The wife, being then about fifty-seven years of age, made her will, dated May 9, 1908, whereby (after reciting that by the settlement certain powers of appointment over the property and estate comprised in and subject to the settlement were reserved to and vested in her in manner mentioned in the settlement, and that her husband in the event of his surviving her was entitled to an estate for life in the property and estate the subject of the settlement), in the event of her dying without ever having had any issue of the marriage, or in the event of there being no child or children of the marriage who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry, she gave, devised, and bequeathed, and in pursuance and exercise of the power of appointment so vested in her as before mentioned, as well as of all other powers enabling her, appointed "all those the hereditaments, premises, property and estate, which at the time of my death may be comprised in and subject to the settlement to my dear husband, his heirs, executors, administrators and assigns, for his own absolute use and benefit"; and as to all the residue of her estate, real as well as personal, whether in possession, reversion, or remainder, the testatrix gave, devised, and bequeathed the same according to the nature or tenure of the same unto her said husband, his heirs, executors, administrators, and assigns, for his own absolute use and benefit, and appointed him sole executor of her will.

The husband died on December 3, 1916, and the wife died on December 7, 1916. There was no issue of the marriage. Administration with the will annexed to the estate of the wife had been granted to the plaintiff. No part of the properties comprised in or subject to the settlement had been sold, and this originating summons was taken out in the matter of the trusts of the settlement and in the matter of the wife's estate by her administrator as plaintiff against the co-heiresses-at-law, who were also the co-heiresses of

the copyhold land, the co-heirs in gavelkind and the next of kin of the wife, and the surviving trustee of the settlement as defendants, for the determination of the question whether the real estate comprised in or subject to the settlement devolved on the wife's death as real estate or as personal estate of the wife.

Hodge, for the plaintiff.

Dighton Pollock, for the co-heiresses-at-law and two of the co-heirs in gavelkind. All the properties comprised in or subject to the settlement devolve as real estate. As regards the properties originally comprised in the settlement there was never any imperative trust for sale, because during the lives of the wife and husband and the life of the survivor it was conditional on their, her, or his consent in writing, which was never given. The authorities on the point are to some extent conflicting, but the fair result of them is that the requirement of the consent of some other person to the sale makes the trust conditional and not imperative: *Lechmere* v. *Earl of Carlisle* (1), *Thornton* v. *Hawley* (2), and *Wrightson* v. *Macaulay* (3) may be cited against me, but *In re Taylor's Settlement* (4), *In re Goswell's Trusts* (5), and the dictum of Sir William Grant M.R. in *Stead* v. *Newdigate* (6) are in my favour on this point. There is a distinction for this purpose where the trust for sale requires the "consent" of the tenants for life and where it is to be exercised at their "request" merely: see per Mathew J. in *Attorney-General* v. *Dodd* (7), where, after referring to *Thornton* v. *Hawley* (2), the learned judge says that it was there held that a provision that the sale should be at the request of the named persons did not prevent the conversion, and was to be explained as "a power to call on the trustees to act, and not as making the sale conditional on the consent, as it were, of the persons named." It is submitted, therefore, that there was no imperative trust for sale in the present case until the death of the wife, and as at that date the property was at home there is no equity on the part of the next of kin as against the heir

(1) (1733) 3 P. Wms. 211, 219, 220, 221.
(2) (1804) 10 Ves. 129, 136, 137.
(3) (1845) 4 Hare, 487, 497.
(4) (1852) 9 Hare, 596.
(5) [1915] 2 Ch. 106.
(6) (1817) 2 Mer. 521, 530.
(7) [1894] 2 Q. B. 150, 155.

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to have it converted from its actual condition: see per Cozens-Hardy M.R. in *In re Lord Grimthorpe.* (1)

Assuming, however, that the settlement operated as a conversion of the real estate into personalty, still a reconversion into real estate took place before or upon the wife's death. Her will alone is sufficient evidence of her election to treat the property as real estate; and independently of her will, she being the only person interested at the date of her death, the property was at home and there is no equity on the part of the next of kin as against the heir to have it converted from its actual condition. *In re Lord Grimthorpe* (1), which was approved by Lord Buckmaster L.C. in *O'Grady* v. *Wilmot* (2), is an authority in my favour on both points.

H. T. Method, for other co-heirs in gavelkind, supported the same argument. *In re Walker* (3) shows that the clause in the settlement that the property remaining unsold should "be deemed personal estate and devolve as such" is inoperative. In the absence of an absolute trust for conversion it is only the Legislature which can alter the devolution of real or personal property. It is unlikely that the settlors intended to create such an absolute trust in respect of an undivided share which would sell at a great disadvantage.

C. W. Turner, for the next of kin of the wife. A direction that land is to devolve as personal estate is at any rate an indication that an out-and-out conversion was intended, as also is the ultimate gift to the next of kin, according to the statute, in the event of the wife predeceasing the husband. The provision requiring the consent of the wife and husband or the survivor to the sale does not apply at all to the after-acquired properties, and, as to the properties originally comprised in the settlement, a mere provision of this character does not prevent the trust for sale from being in the nature of an imperative trust. There is a long line of authority to this effect in *Lechmere* v. *Earl of Carlisle* (4), *Thornton* v. *Lawley* (5), and *Wrightson* v. *Macaulay* (6); and see *O'Grady* v. *Wilmot* (2), per Lord Buckmaster L.C. No real distinction can be drawn for this purpose between the words "request," "consent," or "approbation," and

(1) [1908] 2 Ch. 675.
(2) [1916] 2 A. C. 231, 245.
(3) [1908] 2 Ch. 705.
(4) 3 P. Wms. 211, 219, 220, 221.
(5) 10 Ves. 129, 136, 137.
(6) 4 Hare, 487, 497.

the language of Mathew J. in *Attorney-General* v. *Dodd* (1) does not necessarily involve any such distinction. *In re Taylor's Settlement* (2) is distinguishable from the general line of authority, as in its ultimate destination the property, if no sale was made, was by the settlement in that case treated as realty. *In re Goswell's Trusts* (3) is distinguishable in the same way. The language of Sir W. Grant M.R. in *Stead* v. *Newdigate* (4) was not intended to throw doubt on the general rule. The wife's interest under the settlement therefore was an interest in personal estate, and the burden is on those who claim it as real estate to prove that the wife elected to take it as real estate. Her will is no evidence in the present case; it had no operation until her death. Moreover, her husband having died in her lifetime, the purposes for which she appointed the properties as real estate entirely failed, and the will affords no evidence of any election on her part in the existing circumstances. The testamentary documents on which the Court relied as evidence of election in *In re Lord Grimthorpe* (5) were operative instruments.

In the absence of any definite act of election by the wife there is no ground for saying that the properties are to devolve as real estate merely because she was the only person interested at the date of her death. The settlement effected a conversion for all purposes at the date of the delivery of the deed. *In re Lord Grimthorpe* (5) is distinguishable, as in that case the trust for sale did not arise till after the death of Lord Grimthorpe, who was both tenant for life and settlor; and moreover the other members of the Court (Fletcher Moulton and Farwell L.JJ.), like Eve J. in the Court below (6), decided the case on the ground of an election by Lord Grimthorpe to reconvert into real estate. The view taken by Cozens-Hardy M.R. in *In re Lord Grimthorpe* (5), namely, that the property resulted to Lord Grimthorpe as real estate because at the date of his death there was no enforceable trust for sale, was not necessary for the decision of the case, and amounts to no more than a dictum, and is opposed to *Clarke* v. *Franklin* (7), which shows that, in the case of a deed, conversion, unless all the objects for which it

(1) [1894] 2 Q. B. 150, 155.
(2) 9 Hare, 596.
(3) [1915] 2 Ch. 106.
(4) 2 Mer. 521, 530.
(5) [1908] 2 Ch. 675.
(6) [1908] 1 Ch. 666
(7) (1858) 4 K. & J. 257.

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is directed fail ab initio, takes effect from the date of the delivery of the deed.

Cur. adv. vult.

Nov. 16. NEVILLE J. delivered the following written judgment: —The first point to be determined is whether the settlement of October 2, 1886, operated as a conversion in equity of the real estate comprised in it. I think this is a pure question of construction of the instrument of trust. Did the settlor intend that the property should be deemed of the nature of and devolve as land or as money? It appears, I think, from the form of the instrument in question and the wording of it that the settled property was intended to be treated as personal estate. In my opinion, notwithstanding the dictum in *Attorney-General* v. *Dodd* (1), there is no distinction between the words "with the consent of" or "at the request of" when applied to a tenant for life under a settlement, and in neither case does their introduction prevent a trust for sale from being imperative: see *Lechmere* v. *Earl of Carlisle.* (2) In *O'Grady* v. *Wilmot* (3) in the House of Lords, where the words were "upon the request," the point seems to have been treated as settled. In *Stead* v. *Newdigate* (4), where it was held that conversion had taken place, Sir William Grant M.R., however, says: "When the prescribed period arrives, the trust to sell is absolute and imperative. It is not upon previous requests, it is not with consent and approbation, that the sale is to be made." I think this is no more than a rhetorical emphasis given to the view that conversion had taken place in that case. If Sir William Grant meant to say that the absence of the necessity for previous request or consent and approbation is essential to notional conversion, I do not think there is any ground for the statement. I hold, therefore, in the present case that conversion of the real estate into personalty took place from the date of the deed.

But it is argued that even if that be so, upon the death of Mr. Ffennell on December 3, 1916, reconversion took place before or upon Mrs. Ffennell's death on December 7, 1916, (*a*) because of the election of Mrs. Ffennell to take it as real estate, proved by her will

(1) [1894] 2 Q. B. 150, 155.
(2) 3 P. Wms. 211, 219.
(3) [1916] 2 A. C. 231, 245.
(4) 2 Mer. 521, 530.

of May 9, 1908, and (*b*) because upon the death of Mr. Ffennell no one was interested in the proceeds of sale except Mrs. Ffennell, and the property was at home. With regard to (*a*) I feel little difficulty. I do not think that the will of May 9, 1908, is any evidence of an election to reconvert. It was an appointment to her husband which failed. What Mrs. Ffennell's intention might have been in the events which have happened no one can say. With regard to (*b*), the trust in the events which happened was, as I read the settlement, to pay the moneys arising from the sale to Mrs. Ffennell absolutely. This trust could not be executed without sale. It is true that Mrs. Ffennell, being the only person interested in the property, could during her life have said to the trustees, "I do not wish it sold; convey it to me and I will release you from the trusts." This she did not do. She could also, in my opinion, have enforced the trusts against the trustees and required them to sell and hand over the proceeds to her.

A similar point was considered by the Court of Appeal in *In re Lord Grimthorpe.* (1) In that case Farwell L.J. observed that the point did not arise, but the Master of the Rolls dealt with it at some length and arrived at a conclusion different in this regard from the conclusion of Eve J. in the Court below, who held that upon the death of the settlor the property would have passed as personalty in the absence of election by the settlor that it should pass as realty. There the trust for sale did not arise until the death of the tenant for life, who was the only person, in the event which happened at that date, interested in the property, the ultimate trust being to the settlor. The Master of the Rolls held that the property resulted to the settlor as real estate, the objects for which conversion was directed having entirely failed and the property being at home. The learned judge cited the case of *Davenport* v. *Coltman* (2) as an authority for the proposition that there is no equity for conversion between the executor and the heir. What *Davenport* v. *Coltman* (2) appears to me to have decided is this, that where there is in a will a trust for sale and a division of the proceeds between A. and B., and both A. and B. died in the testator's lifetime, the executors had no equity to enforce conversion, but that the trustees held the property upon trust for the heir. In that case, it is to be observed,

(1) [1908] 2 Ch. 675. (2) (1842) 12 Sim. 588, 611.

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the purposes for which conversion was directed absolutely failed. But if the settlement is to the use of the settlor for life, with remainder to the use of trustees upon trust for sale and to hold the proceeds for certain intermediate purposes, with an ultimate trust for the settlor, his executors, administrators, and assigns, is it the same thing? It is difficult to see why, if the settlement declares the ultimate trust to be for the settlor's executors, administrators, and assigns, equity should declare it to be for his heir. I do not think that in the present case the property was "at home" within the meaning of the decisions. Those words appear to me to apply only to cases where not an equitable title to the property only but the whole property, legal and equitable, is vested in the settlor: see *Pulteney* v. *Earl of Darlington* (1), where the instances given are cases where money covenanted to be laid out in land has never left the hands of the settlor or has been paid back voluntarily by, or recovered by suit in equity against, the trustee. Where in the case of land directed to be sold the legal estate is outstanding in trustees for sale it appears to me that the property cannot be said to be "at home" merely because the settlor at his death was the only person beneficially interested in the proceeds of sale. In the absence of election by him I see nothing to change the character of personalty which the property had acquired upon the execution of the deed. In the case of a resulting trust to the settlor, if conversion took place upon the execution of the deed, I think the property would remain converted when it resulted to the settlor if any of the purposes for which conversion was directed took effect. It would seem that the only case in which the property results to the settlor in its original state is where the purposes fail ab initio: see *Clarke* v. *Franklin*. (2) In the case of a deed it matters not whether the trust for conversion does not arise until after the death of the settlor: see same case. (3) In *O'Grady* v. *Wilmot* (4) Lord Buckmaster, then Lord Chancellor, says, with reference to *In re Lord Grimthorpe* (5): "At the moment of his death he was in fact the absolute owner of the fund, and if he had not exercised the power at all, the property would have passed as his estate. He determined that it should do so as real property,

(1) (1783) 1 Bro. C. C. 223, 236, 237.
(2) 4 K. & J. 257, 265.
(3) 4 K. & J. 264.
(4) [1916] 2 A. C. 231, 245.
(5) [1908] 2 Ch. 675.

and I think the Court of Appeal were quite right in holding that in those circumstances reconversion had taken place." It will be observed that Lord Buckmaster treats the case as depending upon the determination of the settlor that the property should pass as real estate, and it seems to me that this is the true view of the decision in that case. Unless it be the dictum in *In re Lord Grimthorpe* (1), I find no authority for the proposition that whenever the settlor is at the time of his death solely interested under the settlement in the proceeds of sale of land directed to be sold the land will pass to his heir upon intestacy, and I am not prepared so to hold. I think the title of Mrs. Ffennell to the property at the time of her husband's death was a title to personal estate, and it passed as such upon her death to her legal personal representative.

Solicitors: *Hammond & Richards; Carr, Tyler & Overy; R. S. Taylor, Son & Humbert.*

A. C.

EVLING *v.* ISRAEL & OPPENHEIMER, LIMITED.

[1917 E. 247.]

Company—Memorandum and Articles of Association—Construction—"Profits"—Payment of Cumulative Dividend—Reserve Fund—Discretion of Directors—Shareholders—Rights inter se.

By clause 6 of the memorandum of association of a limited company incorporated in 1912 it was provided that the profits of the company in each year should be applicable, first, in payment of a fixed cumulative preferential dividend of 7 per cent. on the preference shares; secondly, in payment of a cumulative dividend at a rate not exceeding 2*s.* per share on the ordinary and "B" shares rateably; thirdly, the surplus (if any) should be carried to a reserve fund until it amounted to 25,000*l.*; fourthly, subject as aforesaid, and to the provisions of article 126, the ordinary shares should confer on the holders the right to one moiety, and the "B" shares should confer on the holders the right to the other moiety of the profits or other moneys of the company available for dividend which the company should determine to distribute. Article 126 provided that the directors should set aside out of the profits of the company such sum as was provided for by sub-section 3 of clause 6 of the memorandum, and might, before recommending any further dividend under sub-section 4,

(1) [1908] 2 Ch. 675.

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set aside out of the profits a further reserve fund. The preference and ordinary shares were of 1*l.* each, the "B" shares of 1*s.* each. For the financial year ending November 30, 1912, the company paid a dividend of 7 per cent. only on the ordinary shares, and a dividend of 6 per cent. for 1913. In 1914 no dividend was paid on any of the shares. In 1915 there was a credit balance to profit and loss account sufficient to pay the full cumulative dividend on the preference and ordinary shares, but no dividend was paid on the ordinary shares, and 6662*l.* 3*s.* 11*d.* was carried over. In 1916 there was a credit balance of 17,066*l.* 19*s.* 4*d.* to profit and loss account and the directors recommended the payment of the cumulative preferential dividend, and, after writing down the value of certain of the assets, placed 5000*l.* to reserve account and carried forward 9580*l.* 6*s.* 10*d.* No dividend was paid on the ordinary shares. The recommendations of the directors were in each year indorsed by resolutions of the company in general meeting. Subsequently to the issue of the writ the defendant company, by special resolution, appropriated out of the profits for 1916 a sum of 4*d.* per share on the ordinary and "B" shares for each of the three years 1914, 1915, and 1916.

In an action by the plaintiff as a holder of ordinary shares for a declaration against the company as to his rights in the profits for the years 1915 and 1916:—

Held, that the "profits" consisted of the credit balance in the profit and loss account of each year; that the case was similar to *Paterson* v. *R. Paterson & Sons* (1916) 53 S. L. R. 404; (1917) 54 S. L. R. 19, to determine the rights of shareholders inter se, and not strictly an action to recover payment of a dividend; and that the plaintiff was entitled to a declaration that, according to the true construction of the memorandum and articles, the defendant company was bound to apply the whole of the profits for the years 1915 and 1916 (after providing for the preference dividend) in payment of cumulative dividends at the rate of 2*s.* a share on the ordinary and "B" shares from the incorporation of the company down to November 30, 1916; and an account on the footing of such declaration.

THE defendant company was incorporated on February 26, 1912, as a private company limited by shares under the Companies Consolidation Act, 1908, with a capital of 51,250*l.*, divided into 25,000 cumulative preference shares of 1*l.* each, 25,000 ordinary shares of 1*l.* each, and 25,000 "B" shares of 1*s.* each. The plaintiff, Samuel Evling, was the registered holder of 200 cumulative preference shares and 300 ordinary shares of 1*l.* each in the defendant company. Of the preference shares 21,075 had been issued, and the whole of the ordinary and "B" shares. By clause 6 of the

memorandum of association of the defendant company it was provided as follows:—"The profits of the company in each year shall be applicable as follows: First: in payment of a fixed cumulative preferential dividend at the rate of 7*l.* per cent. per annum on the capital for the time being paid up on the said preference shares. Second: in payment of a cumulative dividend at a rate not exceeding 2*s.* per share on the capital for the time being paid up on the said ordinary and 'B' shares rateably, without any preference or priority between such shares, and irrespective of the difference in the nominal value of such shares. Thirdly: the surplus (if any) shall be carried and credited to a reserve fund until such reserve fund shall amount to the sum of 25,000*l.* Fourthly: subject as aforesaid, and to the provisions of article 126 of the articles of association, the ordinary shares shall confer on the holders thereof the right to one moiety, and the 'B' shares shall confer on the holders thereof the right to the other moiety of the profits, or other moneys of the company available for dividend, which it shall from time to time be determined to distribute."

By clause 8 of the memorandum the rights and provisions by clause 6 attached to any of the said classes of shares, preference, ordinary, or "B" shares respectively, and any of the provisions under the said clause as to the application of profits or assets of the company might be modified, altered, or abrogated by a special resolution of the company as a whole confirmed as therein mentioned.

By article 125 of the articles of association it was provided: "No dividend shall (except as by the statutes expressly authorised) be payable otherwise than out of profits arising from the business of the company, provided that the directors may, if they think fit, from time to time declare an interim dividend. A declaration by the directors as to the amount of the profits, or other moneys at any time available for dividends shall be conclusive."

Article 126: "The directors shall set aside out of the profits of the company such sum as is provided for by sub-sec. 3 of clause 6 of the memorandum of association of the company, and may, before recommending any further dividend under sub-sec. 4 of the same clause, set aside out of the profits of the company such sum as they think proper as a further reserve fund, which shall at the discretion of the directors be applicable for meeting contin-

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gencies, for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining any property of or works connected with the business of the company, or shall, with the sanction of the company in general meeting, be, as to the whole or in part, applicable for special dividends, or for equalising dividends, for distribution by way of bonus among the members of the company for the time being, on such terms and in such manner as the company in general meeting shall from time to time determine. . . . . The directors may also from time to time carry forward such sums as may be deemed expedient in the interests of the company."

Article 127: "Notice of any dividend that may have been declared shall be given in manner hereinafter provided to such members as are entitled under these articles to receive notices from the company."

Article 136 provided for a balance-sheet to be made out and laid before the company in general meeting, such balance-sheet to be made up to a date not more than three months before such meeting and accompanied by a report of the directors as to the state of the company's affairs and the amount (if any) which they recommended to be paid in dividend, or proposed to carry to reserve.

The regulations in Table A in the Companies Consolidation Act, 1908, did not apply to the company except in so far as repeated or contained in its articles.

The defendant company paid a dividend of 7*l.* per cent. per annum only on its ordinary shares for the financial period ending November 30, 1912, and a dividend at the rate of 6*l.* per cent. per annum only on the ordinary shares for the year ending November 30, 1913. The profits of the defendant company for 1914 were not sufficient to pay the full dividend on the cumulative preference shares. The accounts for the financial year ending November 30, 1915, after writing off investments and certain debtors, showed that there was a credit balance on profit and loss account of 6662*l.* 3*s.* 11*d.*, which sum the plaintiff alleged to be amply sufficient, after payment of the full cumulative dividend on the preference shares (including the arrears for 1914), to pay the full dividend at 10 per cent. per annum on the 25,000 ordinary

shares. The directors, however, advised that, having regard to all the circumstances, in order to place the company in as strong a financial position as possible, no dividend should be paid on the ordinary shares for the time being, and none was paid. The accounts for 1916 showed a net profit of 13,344*l.* 3*s.* 2*d.*, or, after including the sum of 6,662*l.* 3*s.* 11*d.* brought forward from the previous year, a total of 20,006*l.* 7*s.* 1*d.*

In the report for this year, after writing off a sum of 2712*l.* 6*s.* 4*d.* representing debtors in enemy countries, and providing for interim dividend on the preference shares, it appeared there was 17,066*l.* 19*s.* 4*d.* to the credit of profit and loss account. The directors proposed to pay the preference dividend, 737*l.* 12*s.* 6*d.*; to write off goodwill, 1250*l.*; to write off furniture and fixtures, 499*l.* (leaving the nominal sum of 1*l.* only); to transfer to reserve account, 5000*l.*; balance to be carried forward, 9580*l.* 6*s.* 10*d.*—making up the total of 17,066*l.* 19*s.* 4*d.* The directors recommended that no dividend should be declared on the ordinary shares, and the proposed application was approved by a resolution of the company in general meeting on February 20, 1917. The plaintiff alleged that this course was inconsistent with the provisions of the memorandum of association as to the application of profits, and that the profits for 1915 and 1916, after providing for the dividend on the preference shares, should have been applied in paying a cumulative dividend on the ordinary shares and the "B" shares.

By a special resolution of the company passed on February 20, and confirmed on March 19, 1917, the provisions of clause 6 of the memorandum of association were altered, under the power conferred by clause 8 of the memorandum, by the omission of the word "cumulative" therefrom with reference to the dividend on the ordinary shares, and this was confirmed by resolutions passed at separate meetings of the three classes of shares.

The writ in the action was issued on April 5, 1917. On April 16, 1917, an extraordinary general meeting of the company was held which passed a resolution rescinding the resolution of February 20, 1917, as to the appropriation of the profits, and resolving that the balance of 17,066*l* 19*s.* 4*d.* standing to the credit of profit and loss account should be appropriated, inter alia, as to 1250*l.* in

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payment of dividends on the 25,000 ordinary shares of 4*d.* per share for each of the three years ending November 30, 1914, 1915, and 1916, and as to another 1250*l.* in payment of dividends on the 25,000 " B " shares of 4*d.* per share for each of the same three years.

The plaintiff alleged that the last-mentioned resolutions also failed to give effect to the rights of the holders of the ordinary shares, and he claimed, as holder of 300 ordinary shares: (1.) A declaration that, according to the true construction of the memorandum, the company was bound to apply the whole of the profits of the company for the financial years ending November 30, 1915, and November 30, 1916 (after providing for the dividend down to November 30, 1916, on the preference shares), in payment of cumulative dividends at the rate of 2*s.* a share on the ordinary and " B " shares, calculated from the incorporation of the company down to November 30, 1916, after deducting the dividends paid thereon in respect of the financial periods ending November 30, 1912, and November 30, 1913, respectively. (2.) An account on the footing of the foregoing declaration of the sum payable to the plaintiff as the holder of 300 ordinary shares in respect of such cumulative dividend, and payment of the sum found due; and he also claimed alternative and further relief.

By their defence the defendants alleged that the profits shown by the respective reports and balance sheets of 1912-1915 were duly dealt with by the defendant company in general meeting, and that all the dividends declared at such general meetings, or otherwise in accordance with the articles of association, had been duly paid. They further denied that the course recommended by the directors in 1916 was inconsistent with the provisions of the memorandum of association as to the application of profits, and asserted that the profits had been applied in accordance with resolutions of the company in general meeting acting in due course of internal management; and also that it was within the power of the company to write down, and to transfer to reserve fund.

H. E. Wright, for the plaintiff. The case turns upon the construction of clause 6 of the memorandum of association, read in conjunction with article 126 and the other relevant articles. As

to the years 1915 and 1916, it is contended that the directors should have paid the ordinary and "B" shareholders the unpaid balance of the cumulative dividend. Clause 6 of the memorandum is imperative and mandatory as to the application of the profits of the company. There was no jurisdiction in the directors to deal with the profits in any other way, and sub-clause 3 of clause 6 of the memorandum contemplated that the profits might be exhausted before the requirements of sub-clause 2 had been met. The point is dealt with by the Scottish decision in *Paterson* v. *R. Paterson & Sons* (1), where it was held that the directors could not allocate a sum of 3000*l.* to reserve fund before dividing the profits in dividends to shareholders in accordance with article 12 of the articles of association. In the judgment of the Court of Appeal their Lordships held that article 12 prevailed over the provisions of Table A which were incorporated therein, and that the direction as to the allocation of profits was mandatory. That case is very similar to the present, except that article 12 there did not provide for the creation of a reserve fund. In *Fisher* v. *Black and White Publishing Co.* (2) there were different words, namely, "profits from time to time available for dividend," and clause 74 of Table A was not expressly excluded. In the present case the "profits" of the company in the opening words of clause 6 of the memorandum mean the whole profits of the company's business as shown in the profit and loss account.

As to the alteration of the memorandum, that can only take effect from the date of such alteration: *Allen* v. *Gold Reefs of West Africa, Ld.* (3); *James* v. *Buena Ventura Nitrate Grounds Syndicate.* (4) Lastly, it is not a question of the internal management of the company, but of the rights of shareholders inter se under the memorandum and articles.

Maugham, K.C., and *F. Whinney*, for the defendant company. The directors have a discretion under the articles as to what they should place to reserve fund. They have exercised that discretion bona fide, and it cannot be overruled: *Bond* v. *Barrow Hæmatite Steel Co.* (5) The words of clause 6, sub-clause 2, are most unusual—

(1) 53 S. L. R. 404; 54 S. L. R. 19.
(2) [1901] 1 Ch. 174.
(3) [1900] 1 Ch. 656.
(4) [1896] 1 Ch. 456.
(5) [1902] 1 Ch. 353.

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namely, the direction to pay a cumulative dividend "not exceeding 2*s.* per share" on the ordinary and "B" shares; they differ from the fixed rate in sub-clause 1. A dividend of a farthing would come within the description in sub-clause 2. There is nothing to control the discretion of the directors, and no compulsion to divide profits up to the hilt, which might be most unwise.

Articles 125, 127, and 136 must be considered in order to ascertain the contract between the company and its shareholders. The case comes within the principle of *Fisher* v. *Black and White Publishing Co.* (1) Further, the question is one of the internal management of the company: *Burland* v. *Earle* (2); and the Court will not interfere. Lastly, the ordinary shareholders have in past years acquiesced in not receiving their full dividend, and are bound by such acquiescence.

H. E. Wright in reply.

Cur. adv. vult.

Nov. 2. EVE J. The question involved in this action is purely one of construction: Was the defendant company bound to apply the profits for the financial years ending November 30, 1915, and November 30, 1916, after paying or providing for the dividend on the preference shares down to the last-mentioned date, in payment of the unpaid balance of cumulative dividends of 2*s.* a share on the ordinary and "B" shares from the incorporation of the company down to November 30, 1916, or was it in the power of the company, having a sufficiency of profits to pay the whole of such unpaid balance, to pay a part only thereof and to apply the residue of the profits in writing down the value of certain of its assets, in creating a reserve, or to carry such residue forward to the next account?

The plaintiff, as the holder of 300 ordinary shares, asserts that, according to the constitution of the company at the material date, no part of the profits could lawfully be applied to other purposes so long as any part of the balance of the cumulative dividends on the ordinary and "B" shares respectively remained unpaid. The company disputes the existence of any contract to support the claims put forward on behalf of the ordinary and "B" shareholders.

(1) [1901] 1 Ch. 174. (2) [1902] A. C. 83.

The issued share capital of 47,325*l.* is made up of 21,075 preference shares of 1*l.* each, 25,000 ordinary shares of 1*l.* each, and 25,000 "B" shares of 1*s.* each, and the respective rights of the holders of these shares in the profits of the company were regulated during the period under review by clause 6 of the memorandum and by the contemporaneous articles as originally framed. These rights have recently been modified, but the modifications in no way affect the questions in difference in this action.

It is, I think, conceded by the company—but if not conceded I hold that the profits referred to in the opening sentence of clause 6 of the memorandum are the profits arising from the carrying on of the company's business—in other words, the credit balance in each year's profit and loss account.

Not only is this the primary meaning of the words, but in the concluding paragraph of this very clause the words are repeated with the addition "available for dividend"; a qualification which clearly shows that where the words are used without it they mean something more than profits available for dividend. The clause therefore deals with the application of the company's profits in the wider sense I have indicated: see *Fisher* v. *Black and White Publishing Co.* (1)

No point arises on the first operative paragraph of the clause, but the second has given rise to considerable discussion. The plaintiff argues that it gives to the holders of the ordinary and "B" shares respectively a right to have the profits applied—after paying the preferential dividend—in or towards payment of a cumulative dividend of 2*s.* per share; and in support of this contention he relies strongly on the wording of the third paragraph, which, he says, obviously contemplates a possible exhaustion of the profits before the requirements of the second paragraph have been satisfied. The company, on the other hand, insists on the difference in the phraseology between paragraphs 1 and 2, by which latter, it is argued, no rate is fixed but only a limit imposed. So long as any dividend not exceeding 2*s.* per share is paid on the ordinary and "B" shares the requirements of the second paragraph are, says the company, complied with.

The wording of paragraph 2 is, I think, a little obscure, but

(1) [1901] 1 Ch. 174.

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upon the construction of the memorandum, and looking for the moment at that alone, I come to the conclusion that the plaintiff is right. I think that the explanation of the wording employed in paragraph 2 is to be found in this, that the rate of dividend on the shares therein dealt with can never be a fixed or uniform rate: it is to be on the capital for the time being paid up on the two classes of shares; and as each ordinary share when fully paid will have 20*s.* paid up thereon, and each "B" share when fully paid will have but 1*s.* paid up thereon, a dividend of 2*s.* per share will be at the rate of 10 per cent. on the ordinary share and 200 per cent. on the "B" share; or, again, if the "B" shares be fully paid up and the ordinary shares only paid up to the extent of 10*s.*, a dividend of 2*s.* per share would be at the rate of 200 per cent. on the "B" share and 40 per cent. on the ordinary share. In my opinion it was to avoid the difficulties presented by these variations of rate that the draftsman resorted to the language he has adopted for the second paragraph.

But the company further urges that in order to ascertain the contract between the company and any particular class of shareholders regard must also be had to the contemporaneous articles, and that clause 6 of the memorandum must be read in conjunction in particular with articles 125 and 126. I agree; and, having arrived at what I conceive to be the true construction of clause 6, I must now consider whether that construction is to any extent controlled or varied by the articles, or whether they cannot be so interpreted as to be consistent with the construction impressed on the memorandum. I do not see anything inconsistent with that construction in either of the articles referred to. The power conferred upon the directors by article 125 to declare interim dividends is quite consistent with the existence of the rights I have held to be attached to the ordinary and "B" shares under clause 6 of the memorandum. It enables the directors, if satisfied that there will be profits for any year in excess of the amount required to meet the preference dividend, and that the financial position of the business will not be prejudiced thereby, to make a distribution on account without waiting till the close of the financial year. The concluding sentence in that article and the whole of article 126, except the first sentence, refer, as I read

them, to the condition of things brought about when the fourth paragraph of clause 6 comes into operation, and ought not to be read as controlling or restricting any of the first three paragraphs of that clause; and, so read, they are, I think, perfectly consistent with the construction I have placed on clause 6.

I do not think the fact that the voting power is in the hands of the ordinary and "B" shareholders has really any relevancy to the question in dispute. The right involved is the right of the individual shareholder, and until it has been abrogated by the procedure provided for in clause 8 of the memorandum it cannot be taken away from him, even though an overwhelming majority of the same class is willing that it should be. Nor, again, is a shareholder whose right is to receive a cumulative dividend to be prejudiced by the fact that on former occasions he has not insisted on receiving the full percentage in any particular year. Finally, I do not think the Court is concerned to inquire whether the company could really have intended to divide the whole of its profits amongst its shareholders. Such a result does not necessarily follow from the conclusions at which I have arrived, for it may well be that the knowledge possessed by those who formed the company of the business it was acquiring justified them in the belief that the profits would always be in excess of the amount required to pay the preference dividend and the maximum dividends on the ordinary and "B" shares, and that the memorandum was framed accordingly. But, whether this be so or not, I do not think the point is one which can properly affect the construction. Nor do I think that the action can fairly be said to be an action to recover a dividend and to be demurrable because the dividend was not in fact declared: *Bond* v. *Barrow Hæmatite Steel Co.* (1) It is an action similar in all respects to that of *Paterson* v. *R. Paterson & Sons* (2), to determine the rights of shareholders inter se, and although, when these rights have been ascertained, the result may be a further payment by way of dividend to the plaintiff and others, the action is not strictly an action to recover payment of a dividend.

In my opinion the plaintiff is entitled to a declaration in accordance with paragraph 1 of his claim, and to an account on the footing of that declaration. There will be no order for payment, but liberty

(1) [1902] 1 Ch. 353. (2) 53 S. L. R. 404; 54 S. L. R. 19.

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to apply will be reserved to the plaintiff, and the defendants must pay the costs of the action.

Solicitors: *Meaby & Co.; Kimber Bull, Duncan, Howland & Co.*

G. M.

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[1914 B. 1336.]

Costs—Taxation—Trustee-Solicitor—Action to set aside Settlement—Charges of Undue Influence—Dismissal of Action—Fees—Two Counsel—Discretion of Taxing Master—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 29, 38.

A trustee-solicitor, defendant in an action to set aside the settlement of which he is trustee, against whom unfounded charges of misconduct are alleged in the statement of claim, is entitled to the costs of briefing two counsel in his defence, although the plaintiff has abstained from claiming any relief against him personally, and has professed in the pleadings to sue him only as trustee.

Decision of Eve J. [1917] 2 Ch. 285 affirmed.

APPEAL from a decision of Eve J. (1)

The question arising upon the appeal was whether the taxing Master was right in disallowing altogether the fees for leading counsel of one of the defendants, who was a solicitor-trustee, and reducing the fee for his junior counsel.

The action was one to set aside, on the ground of undue influence, so much of a resettlement, made by a father and his son in 1903, as provided for the raising and payment of a sum of 7000*l.* to the father out of the capital of the trust property, and also to set aside on the same and other grounds a purchase by the father from the son in 1907 of the reversionary interest of the latter in what remained of the trust property. The plaintiff sued as mortgagee of this reversionary interest, and had been induced by the son in 1913 to advance 1000*l.* on the security of it without being informed of the previous sale to the father. Both father and son were trustees of the resettlement and were sued in that capacity and also as beneficiaries. The other two trustees, Alfred and

(1) [1917] 2 Ch. 285.

Charles Edmundson, were added as defendants and were sued only as trustees. Alfred had no personal interest in the resettlement and submitted to act as the Court should direct. Charles was a relative of the father and son, and had acted as the family solicitor by whom the proposals for the resettlement were originally formulated. The statement of claim contained serious charges of undue influence against the father and Charles, but no relief whatever as to costs or otherwise was claimed as against Charles.

At the trial Alfred and Charles were represented by leading and junior counsel, and so was the father. The son was not called as a witness, being out of the country. Charles was called by the father, and in the result Eve J. held, upon the evidence, that undue influence had not in fact been exercised, and he dismissed the action with costs. (1) In taxing the costs the taxing Master disallowed altogether the fees for leading counsel, and reduced the fee for junior counsel on behalf of Alfred and Charles Edmundson on the ground that they were sued as trustees only and that Charles was not entitled to the costs of briefing two counsel in defence of his character.

Upon a summons to review taken out by the defendants Alfred and Charles Eve J. referred the matter back to the taxing Master with an intimation that the defendants ought to be allowed the costs of briefing two counsel. The plaintiff appealed.

The facts are more fully stated in the report in the Court below (2) and in the judgment of Swinfen Eady L.J.

Maugham, K.C., and *A. M. Begg*, for the appellant. The meaning of the allegations contained in the statement of claim against Charles Edmundson is that he assisted in and advised the scheme as solicitor and friend of the family. There is no imputation of dishonesty or moral obliquity on his part. The allegation is that he was acting for the father and did not protect the son. No relief of any kind was claimed against him personally. He was a necessary and formal party to the action and was in no peril as to costs. It would be wrong to hold that because a man is a formal party to an action therefore he should be allowed the costs of refuting charges that are not relevant to any claim against him. If irrelevant charges

(1) (1915) 113 L. T. 1197. (2) [1917] 2 Ch. 285.

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are made in the pleadings against a defendant his proper remedy is to apply to strike them out. He cannot get the costs of refuting them at the trial. These are costs incurred by excess of caution and should not be allowed: Order LXV., r. 27, sub-r. 29. [*Hoblyn* v. *Hoblyn* (1) was referred to.]

P. O. Lawrence, K.C., and *Dighton Pollock*, for the respondents, were not called upon to argue.

SWINFEN EADY L.J. This is an appeal from an order of Eve J. The order in question was made upon a summons for review of the taxation directed by the judgment at the trial of the action. The Master, in taxing, had not allowed to one defendant, Charles Edmundson, the cost of two counsel—leading and junior counsel. The learned judge, upon objection, overruled that and referred the matter back to the Master to allow two counsel; from the order allowing two counsel the present appeal is brought. The facts may be very shortly stated. There was a settlement by the will of the testator, and then after the first tenant in remainder had come of age there was a resettlement dated May 21, 1903, in which the father and son joined. Under the provisions of this resettlement the father took power to raise and withdraw from the settlement the sum of 7000*l.*, and, subject to that, the son was assured an income of 100*l.* a year, increasing in certain events to 150*l.* a year. That being the position, the son got into money difficulties, and a receiving order was made against him; and ultimately, by some arrangement made in the bankruptcy proceedings the father bought the son's annuity and reversionary interest for a sum of about 1200*l.* That sum was sufficient to pay the debts and liabilities of the son, against whom the receiving order had been made. Some seven years afterwards the son, not communicating to the plaintiff that he had sold his interest under the resettlement, purported to mortgage it to the plaintiff to secure an advance of 1000*l.* The plaintiff advanced the money in good faith, and without any notice or knowledge, or even suspicion, that the son had previously parted with his interest. That was the position in 1913. If that were all the plaintiff would have taken nothing by his mortgage—the mortgagor had nothing to give

(1) (1889) 41 Ch. D. 200.

him; but in the year 1914 the plaintiff brought an action in which he made certain allegations which I will refer to in a moment, and in which he claimed to have the resettlement re-formed or rectified or partially set aside—set aside so far as would be necessary to re-form it or rectify it by excluding from the resettlement the power to raise the 7000*l.* The claim also asked that the sale by the son to the father might be set aside as being at an under-value, the plaintiff submitting to redeem a Mr. Burrill, from whom the father had borrowed the 1200*l.* to pay for the reversionary interest which he had purchased. That was the nature of the action, and the defendants to it were the father and the son, who were also trustees of the resettlement, Mr. Charles Edmundson, who, I think, was a cousin of the father, and Mr. Alfred Edmundson, who was a brother of the father, who were also trustees of the resettlement. The learned judge held, and in my judgment rightly, that the statement of claim contained allegations against Mr. Charles Edmundson. He is a solicitor carrying on business as a member of the firm of Edmundson & Gowland at Masham in Yorkshire, and the statement of claim contains allegations that this resettlement was improvident and improper; that it was proposed either by the father or by Charles; that Charles prepared the documents; that the son was nominally represented by a separate solicitor who was introduced for the occasion by Charles; that that solicitor personally disapproved of the terms of the resettlement, but his advice had no weight with the son, who was on affectionate terms with his father and Charles, and placed implicit confidence in them; the suggestion being that, although the independent solicitor advised against this improvident resettlement, Charles Edmundson used his influence to override the independent solicitor's objections. The statement of claim goes on further to allege that the father and Charles stated to the son that the father was then considerably indebted—it is said to the extent of something like 7000*l.*; that such indebtedness of the father had arisen partly in respect of expenditure upon the education of the son and preparing him for the army, and that there was therefore some moral claim by the father against the son to be recouped out of the settled property. The learned judge has found and stated in his judgment two matters: first, that the statement of claim did contain allegations affecting

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the personal honour and integrity of Charles Edmundson, who occupies some important public positions, and, secondly, that those allegations were wholly unfounded; and he said (1): "These allegations, relating as they do, to matters constituting part of the undue influence on which the plaintiff intended to rely, were properly pleaded in compliance with r. 6 of Order XIX." In fact, undue influence was the ground on which this resettlement was attempted to be set aside or re-formed. He then said: "I do not agree with the argument on the part of the plaintiff that they contain no charge of personal misconduct on the part of Charles, or that they can be construed as referring only to acts done by him as solicitor for and on the instructions of his co-defendant George" (the father). "The plaintiff, in my opinion, did in his pleading allege conduct by Charles amounting to an improper exercise on his part of the influence which his age, his knowledge of business, his relationship, and the confidence reposed in him by the younger man had all combined to give him, and no surprise can be felt that Charles, who fills more than one public office in the locality where he practises, and whose conduct in these matters was, as events turned out, found to be quite irreproachable, was not prepared to go to trial without being so represented at the hearing as to make sure of his character being completely vindicated. It was in these circumstances that leading counsel was briefed for the trustees as well as for the principal defendant, George Edmundson." I entirely agree with the learned judge's statement there of the facts, and of the way in which he reads this pleading, and I am quite satisfied that the charges were made against Charles; and it would be idle to say that when charges of a serious nature are made against a solicitor, that he is not to appear and defend himself at the trial and, if the charges fail, to ask for the costs of them even if they are not relevant to the claim as formulated; but in my opinion these charges were relevant. The claim as formulated was to reform the settlement by reason of undue influence. The alleged undue influence exerted by Charles was part of the ground of the plaintiff's complaint. For these reasons I am of opinion that the defendant so attacked was amply justified in instructing leading counsel as well as junior counsel to appear and defend him.

(1) [1917] 2 Ch. 290, 292, 293.

Then the only other point that was raised is that in form the bill was not carried in properly. There might possibly, under other circumstances, have been something to say for that, not as a point of substance, but as a point of form, but I think the way in which the learned judge dealt with it in the Court below precludes our further consideration of the matter. He says: "I think in form this contention is right"—that is, as to the way the bill was headed —"but in form only. The entries in the bill after October 12 ought to have been charged to Alfred and Charles jointly, and as from that date the bill ought to have been brought in for taxation as the joint bill of the two, but no one disputes or repudiates the arrangement referred to in the note I have read from the bill, and no one in the face of that note suggests that he has been misled by the manner in which this bill and the bill of the other defendants were brought in for taxation. The taxing Master, in the presence and with the tacit consent of all parties, has conducted the taxation on the footing that the agreement was in fact come to, and would, I doubt not, have allowed the titles of the bills to be amended had objection been taken thereto. In these circumstances I cannot allow this application to be disposed of on an objection which goes to form only and does not in any way affect substance." I do not gather that this objection in form only was raised before the taxing Master, or that there was any question whether the title of the bill should not be altered or the bills themselves remitted so as to bring them into a form in which these charges were properly made out; I do not gather that that was raised at all. Under these circumstances I am of opinion there is nothing in the objection; it was a mere matter of form. For these reasons, in my judgment, the learned judge was right in allowing the costs of two counsel, and the appeal fails.

WARRINGTON L.J. I agree.

SCRUTTON L.J. I agree.

Solicitors: *Burton, Yeates & Hart, for Edmundson & Gowland, Masham; Duffield, Bruty & Co.*

G. A. S.

C. A.
1917
Nov. 5, 6.

In re SMYTH.

EDWARDS *v.* SMYTH.

[1915 S. 1451.]

Revenue—Estate Duty—Timber—Proceeds of Sale—Incidence of Duty—Tenant for Life and Remainderman—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 61, *sub-s.* 5—*Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 9—*Finance Act*, 1894 (57 *& 58 Vict. c.* 30), *s.* 9.

Sect. 61, sub-s. 5, of the Finance (1909-10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, relating to the estate duty on timber, is to be construed in the light of s. 9 of the Finance Act, 1894, which throws the liability for estate duty in respect of property not passing to the executor as such ultimately on the persons taking the benefit of such property. And as, under the Act of 1912, the duty attaches on the net moneys received from the sale of timber, a tenant for life not impeachable for waste, who receives the proceeds of timber sold apart from the land, has to bear the duty thereon, and such duty is not, since the recent Acts, as prior thereto it was, a charge on the inheritance of the land including the timber.

Quaere, whether the general expression used in both the sections of the Acts of 1910 and 1912, "the owners or trustees of such land," may not include a tenant for life who has power to sell the timber and keep the proceeds.

Decision of Sargant J. [1917] 2 Ch. 331 affirmed.

APPEAL from a decision of Sargant J. (1)

By her will, dated June 28, 1913, Dame Emily Frances Smyth, widow, after appointing the plaintiffs executors and trustees thereof and trustees for the purposes of the Settled Land Acts, 1882 to 1890, devised her freehold estates, subject to certain annuities, to the use of her daughter Esme Irby during her life, with remainder to the use of her first and other sons successively according to seniority in tail male, with remainder to the use during her life of Esme Frances Irby, the daughter of the said Esme Irby, with remainder to the use of the first and other sons of Esme Frances Irby successively, according to seniority, in tail male, with remainder to the use of her first and other daughters successively, according to seniority, in tail male, with remainder to the use of the second and younger daughters of Esme Irby, successively, according to

(1) [1917] 2 Ch. 331.

seniority, in tail male, with remainder to the use during his life of the testatrix's nephew Bromley George Vere Way, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The will contained a declaration that every estate for life should be without impeachment for waste. It also contained a direction to the executors out of her personal estate to make certain payments in the first, second, and third places respectively mentioned, and in the fourth place to pay, amongst other duties, all the estate duty on her freehold estates thereinbefore devised; and subject to those payments the testatrix bequeathed her residuary personal estate to Esme Irby.

The testatrix died on November 23, 1914, and her son-in-law, the Hon. Gilbert Neville Irby, subsequently assumed the name of Smyth, his wife, the said Esme Irby, thereby becoming Mrs. Smyth, by which name she is referred to in this report.

After the testatrix's death several sales of timber were made by Mrs. Smyth, the tenant for life of the settled estates. In some cases the timber was sold together with the land on which it was standing, the proceeds of which were received by the trustees, and the duty thereon was duly accounted for by them. In other cases Mrs. Smyth cut and sold the timber apart from the land, the net proceeds of which amounted to 41*l.* 1*s.* 5*d.* She made further sales of the standing timber on certain other portions of the settled estates, and the proceeds of such sales amounted to 5882*l.* The proceeds of the felled timber were retained by Mrs. Smyth, estate duty at the rate of 19 per cent. having been assessed and paid on the sums of 41*l.* 1*s.* 5*d.* and 5882*l.*

An originating summons was taken out by the trustees of the will to which the following persons were made defendants—namely, Mrs. Smyth, the tenant for life in possession, without impeachment of waste, of the settled estates; Esme Frances Sylvia Irby, an infant, the first tenant for life in remainder expectant on the death of her mother, Mrs. Smyth, and failure of her male issue; Bromley George Vere Way, the second tenant for life in remainder subject to the prior limitations; and two persons who were legatees respectively under the will and a codicil of the testatrix.

The summons raised several questions for the determination by

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the Court, of which the following only calls for a report—namely, whether the estate duty payable under s. 61, sub-s. 5, of the Finance (1909-10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, on the net moneys received from sales of timber, whether cut by the defendant Mrs. Smyth and then sold or sold by her standing but apart from the land, ought to be paid by the trustees and charged against capital, or whether the same or any and what proportion ought to be borne by the defendant Mrs. Smyth.

As it was decided on the hearing of the summons, amongst other things, that, on the construction of the will, the testatrix intended that the respective payments directed to be made out of personal estate should be made in the order of priority stated in the will, and as there was not sufficient personal estate remaining to provide the estate duty in question, which was directed to be paid "in the fourth place," nothing turned on the particular direction in the will as to the incidence of this estate duty in respect of the timber, which fell, therefore, to be determined upon the construction of the Finance Acts and general principles.

Sargant J. held that as, under the Act of 1912, the duty attached to the net moneys received from the sale moneys, Mrs. Smyth, the tenant for life, who had received the proceeds of the timber sold apart from the land, must bear the duty thereon, and that such duty was not, since the recent Acts, as prior thereto it was, a charge on the inheritance of the land including the timber.

Mrs. Smyth appealed.

Maugham, K.C., and *H. B. Vaisey*, for the appellant. The question is whether the Legislature has by s. 61, sub-s. 5, of the Finance (1909-10) Act, 1910, which postpones the payment of estate duty on timber, altered the incidence of that duty. The difficulty is occasioned by the proviso to that sub-section, which provides that "if at any time the timber, trees, or wood are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but for this sub-section, would have been payable on the death of the deceased, after deducting the amount (if any) of estate duty paid in respect of the timber, trees, or wood under this sub-section since that date, shall become payable." In cases not falling within that

proviso the duty is paid on what is received for the timber; so that if the tenant for life cuts the timber himself and sells it he pays the duty. If, on the other hand, he sells the timber as it stands he has to ascertain the proportion of the duty attributable to the value of the timber as at the date of the testator's death, and is only liable to pay the interest on the amount so ascertained. Under the proviso to sub-s. 5 of s. 61 the duty is to be ascertained by reference to the circumstances existing at the death of the testator, while under the rest of the section the duty is to be ascertained by reference to the circumstances existing when the timber is felled. Sect. 9 of the Finance Act, 1912, in effect merely alters the provision for aggregation in s. 61, but otherwise leaves the section unaltered.

[WARRINGTON L.J. The Legislature now seems to treat the timber as something apart for the purposes of the payment of estate duty.]

It is submitted that there was no intention to alter the incidence of the duty.

[WARRINGTON L.J. The result of the two sections is that no duty is payable unless the timber is sold with or without the estate.

SCRUTTON L.J. referred to s. 9, sub-s. 6, of the Finance Act, 1894.

SWINFEN EADY L.J. The duty is a charge on the money in the hands of the tenant for life. Where do you find any provision in the Acts that any one is to recoup her?]

It was, it is submitted, the intention of the Act to leave the incidence of the duty where it was—i.e., a charge on the land. Where the Legislature has intended to alter the incidence of the duty it has done so in express terms. For example, s. 20, sub-s. 1, of the Finance Act, 1896 (59 & 60 Vict. c. 28), deals with a case very analogous to that of timber, and treats objects of national, scientific, or historic interest as estates by themselves. If timber is to be treated as an estate by itself, why does not the Act so provide? Consider the position before the sections were enacted. Estate duty was then paid on the inheritance, and if the timber was sold by the tenant for life he could have put the whole of the proceeds into his pocket. If that anomaly was intended to be remedied it would have been more clearly stated in the Acts.

[SWINFEN EADY L.J. The key to the sections is that until a

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pecuniary benefit is obtained no duty is to be paid. Prima facie a tenant for life is accountable for duty under s. 9, sub-ss. 1 and 5, of the Finance Act, 1894, and I do not see under what provision he obtains any right to get the duty back again.]

As between the Crown and a subject the subject can only be taxed if the intention to tax him is perfectly clear. So where one subject, A (namely, the inheritance), is taxed, the imposition cannot be transferred to another subject, B (in this case the limited owner and tenant for life), unless the intention to do so is perfectly clear. Here before s. 61 was enacted the Crown said that the inheritance was charged with the duty on timber. If the liability to pay the duty is to be transferred from the inheritance and imposed upon a tenant for life unimpeachable for waste, it can only be done if the words used clearly indicate that intention. Here the words are not sufficiently clear. It is significant that it does not appear that the Legislature has given an express direction that the persons who are to pay the duty are the persons who receive the proceeds of sale. And in the present case the sales which came under the proviso are the more important. The appellant's case is stronger under the proviso which does not mention proceeds of sale. Her case really depends on whether the new sections are sufficiently clear to transfer the liability from the inheritance to the limited owner.

Clayton, K.C., and *Howard Wright*, for the plaintiffs as representing interests of remaindermen, were not called upon.

Topham, for the infant respondent, Esme Frances Sylvia Smyth.

Fairfax Luxmoore, for the remaining respondents.

SWINFEN EADY L.J. This is an appeal from a decision of Sargant J. upon an originating summons, and the point raised is as to the incidence of estate duty upon the proceeds of sale of certain timber that has been sold and felled during the lifetime of the tenant for life who is unimpeachable for waste.

The appellant is the tenant for life under a will by the terms of which the land on which the timber was growing stands limited to her use for life without impeachment for waste, with remainder to the use of her daughter for life without impeachment for waste, with divers remainders over. The appellant, under her powers as tenant for life, has sold the timber to the extent of between 5000*l.*

and 6000*l.*, and the timber has been felled and she has been paid; and the question is as to the incidence of the estate duty.

Prior to the Finance (1909-10) Act, 1910, estate duty in respect of timber was not separately assessed, but when estate duty became payable on a property the land with the timber upon it was assessed for duty, and the duty was payable on the aggregate value. Later it was thought not to be fair that estate duty should be assessed on the timber on the dropping of lives, where no timber had been cut and no owner, whether absolute or limited, had received any pecuniary benefit from the timber. Therefore in the Finance (1909-10) Act, 1910, s. 61, sub-s. 5, it is provided: "Where an estate, in respect of which estate duty is payable on the death of a person dying after the passing of this Act"—the date has been altered since to an earlier date, but the life in question dropped since the Act came into operation—"comprises land on which timber, trees, or wood are growing, the value of such timber, trees, or wood shall be aggregated"—that aggregation is abolished by a subsequent statute—"with the other property passing on the death of the deceased for the purpose of determining the value of the estate and the rate of estate duty, but the estate duty which, but for this sub-section, would be payable on the principal value of the timber, trees, or wood shall not be payable thereon, but shall, at the rate so ascertained, be payable on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of the timber, trees, or wood when felled, during the period which may elapse until the land on the death of some other person again becomes liable or would, but for this sub-section, have become liable to estate duty, and the owners or trustees of such land shall account for and pay the same accordingly as and when such moneys are received, with interest at the rate of three per cent. per annum from the date when such moneys are received."

Under the provisions of the Finance Act, 1912, s. 9, the first paragraph of that sub-s. 5, which is the portion I have just read, is repealed; but it is re-enacted except that the provision for aggregation, in order to determine the rate of the duty, is omitted and that the more appropriate word "cut" is used with regard to underwood instead of, as in the Act of 1910, the inappropriate word

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"felled." It is s. 9 of the Act of 1912 which applies here, and it provides that estate duty shall not be payable in respect of timber except on the occasion of the timber being felled, and that then duty at the rate due to the principal value of the estate shall be paid on the proceeds as and when such moneys are received, with interest as from that date at 3 per cent. per annum.

It is not disputed that under the provisions of the Finance Act, 1894, neither timber nor the proceeds of sale of timber pass to the executor as such; and, therefore, a rateable part of the estate duty in proportion to the value of the property is a first charge on that property in respect of which the duty is levied; so that the proper estate duty constitutes a first charge on the timber moneys. Sect. 9, sub-s. 5, of the Act of 1894 provides: "A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property, or any part thereof." Therefore we start with this—that the property charged with the duty is the timber moneys.

It is said, however, that there is an indication in s. 9 of the Act of 1912 that the tenant for life has not himself to bear the burden, because the phrase is now, "the owners or trustees of such land shall account for and pay" the duty. The word "owners" there probably extends to and includes a limited owner; a limited owner is an owner, and the phrase "the owners or trustees of such land" is not an accurate, but rather a loose expression. It may well be that a limited owner as well as an absolute owner is within the expression, but that is not material for the decision of this case.

The effect of s. 9 of the Act of 1912 is to provide for the payment of duty out of the proceeds of sale. Where is there any provision to throw the duty on any other part of the estate? It was argued by Mr. Vaisey that, under the old law before the two statutes of 1910 and 1912, duty would have fallen upon the inheritance, so that the tenant for life would have only had to bear the loss of the interest on the amount paid for duty; and it was said that these two Acts did not with sufficient clearness and freedom from ambiguity change

the destination of the duty. I see no way of escape from the provisions charging the duty in a case such as this on the tenant for life's property; and, whether his hand is the hand to pay it or whether the trustees of the settled estate raise and pay the duty, it has to come out of this property, that is, out of the proceeds of sale of the timber. There is nothing to throw it upon the rest of the estate. I come the more readily to that conclusion as it is obviously fair that the burden of the duty should fall on the person who obtains the pecuniary benefit of the timber; and here the legal tenant for life is entitled absolutely and beneficially to the whole proceeds of the timber. Under the Acts of 1910 and 1912 the timber on an estate is treated for the purpose of estate duty as a separate asset. The duty is not payable until some one obtains a pecuniary benefit from it. It manifestly seems right and fair and proper that the person who takes beneficially the whole interest in the proceeds of the timber should bear the estate duty; and, in my opinion, the statute throws it upon this asset and gives the owner no right to recoupment out of any other fund.

I think, therefore, that the appeal fails and that the judgment of the Court below was right.

WARRINGTON L.J. I am of the same opinion. The declaration of Sargant J. which gives rise to this appeal is: "This Court doth declare that the estate duty under s. 61, sub-s. 5, of the Finance Act, 1910, as amended by s. 9 of the Finance Act, 1912, on moneys received by the defendant Esme Smyth from sales of timber actually severed from the settled land, whether cut by her and then sold or sold by her standing and then cut, ought not to be charged against or borne by the capital of the settled estates, but ought to be borne and paid by the said defendant." In my opinion, that declaration clearly refers, and refers only, to the proceeds of sale of timber actually severed from the land during the lifetime of the tenant for life.

The tenant for life in this case is a legal tenant for life unimpeachable for waste. There is no trustee who has anything to do with the land at the present time except the trustees appointed for the purposes of the Settled Land Act, who, of course, take no estate in the land. Under s. 9 of the Act of 1912, which is the operative sec-

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tion so far as regards timber which has been actually felled, the duty is payable " on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of timber, trees, or wood when felled or cut during the period which may elapse until the land, on the death of some other person, again becomes liable, or would, but for this sub-section, have become liable to estate duty, and the owners or trustees of such land shall account for and pay the same accordingly as and when such moneys are received, with interest at the rate of three per cent. per annum from the date when such moneys are received."

The moneys with which we are dealing are moneys received from the sale of timber cut during the period in question. By the terms of this section, therefore, the estate duty is payable on those moneys, and those moneys are moneys which are to be received by, and belong to, the tenant for life who is unimpeachable for waste. Then under s. 9 of the Act of 1894, which has to be read as part of the Act of 1912, the duty payable on these proceeds of sale, which are not moneys passing to the executor as such, is a first charge on those moneys. Prima facie, therefore, the duty is charged upon, and payable out of, moneys belonging to the tenant for life. I look in vain for anything in the section, or in the equitable doctrines relating to the incidence of charge, which would justify the contention that there is anything to shift the prima facie liability to the charge from the person owning the property charged to some other person. Therefore it seems to me that, the charge here being a charge against the property of the tenant for life, the duty must be paid by her.

I should like to add one word as to the expression " the owners or trustees " of the land who by s. 9 of the Act of 1912 have to account for and pay the estate duty. I see no difficulty at all in holding that a legal tenant for life is the owner within that expression. In the case of a legal settlement of land the trustees have no estate in the land, and it seems to me that it may be quite right to read this part of the section as meaning that the duty is to be paid by the beneficial owner if the land be vested in him, or by the trustees if the land be vested in them. In this case the land is vested in the tenant for life. It seems to me it is she who as owner has to account for the duty, and that, of course, removes all difficulty that there

might otherwise have been. I agree, therefore, that the decision of Sargant J. was right.

SCRUTTON L.J. In agreeing in this decision, I understand myself to be deciding one point only, that is, that a tenant for life without impeachment for waste, who receives proceeds of timber cut or caused to be cut by him, is liable for the estate duty that becomes payable on the cutting of that timber. I desire to say that, because I can quite see that many difficult questions may arise as to the exact meaning of the proviso to s. 61, sub-s. 5, of the Act of 1910. I do not understand the Court to be saying anything at present as to the construction of the proviso in events that are not before us and which may arise in other cases.

On this particular occasion the Finance (1909-10) Act of 1910 has to be construed with the Act of 1894, and s. 8, sub-s. 4, of the Act of 1894 is, so far as material, in these terms: "Where property passes on the death of the deceased, and his executor is not accountable for estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, ... shall be accountable for the estate duty on the property." Those words appear to me to describe exactly a tenant for life without impeachment for waste who cuts timber and receives the money, and, under that section, it appears to me the tenant for life is clearly liable to account for the estate duty; and I am unable to find any provision which enables him to pass that liability on to the inheritance.

I am inclined to agree with Warrington L.J. as to the meaning of the word "owners" in s. 61, sub-s. 5, of the Act of 1910.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol.*

W. I. C.

ASTBURY J.
1917
Nov. 8, 14, 15.

In re BARKER.
GILBEY *v.* BARKER.

[1917 B. 629.]

Will—Advances—Debts—Hotchpot Clause—Settled Shares—No implied Release of Debts.

A mere direction that debts owing by the life tenants of settled shares of residue shall be brought into hotchpot and treated as part of those settled shares, and that any securities therefor shall be deemed authorized investments and allocated to those settled shares, is not by itself sufficient to extinguish the debts.

Limpus v. *Arnold* (1884) 15 Q. B. D. 300, *In re Cosier* [1897] 1 Ch. 325, and *In re Trollope* [1915] 1 Ch. 853 distinguished.

ORIGINATING SUMMONS.

By his will, dated July 24, 1914, a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and directed them to stand possessed of the net proceeds, after paying funeral and testamentary expenses, debts and legacies, and providing for annuities, upon trust (in the events that happened) to divide the same into five equal shares and appropriate one share apiece to the testator's daughter Sarah (a trustee), his brothers Joseph, Levi and Francis, and his sister Annie upon the trusts thereinafter declared (under which the testator's daughter took absolutely and his brothers and sister respectively took protected life interests, with remainder to their children).

The testator then directed as follows: "And I direct that in making such division any money owing to me at the time of my decease by any of my said brothers shall be brought into hotchpot and treated as part of the share or shares appropriated in respect of such brother or brothers. And I also direct that any security or securities which I hold in respect of any such money so owing to me as aforesaid shall be deemed to be authorised investments hereunder and shall be allocated to the share or shares appropriated in respect of the brother or brothers from whom I hold such security or securities and held by my trustees" upon the trusts applicable thereunder to such shares respectively. "And I give my trustees the fullest power and authority in their sole and unfettered discretion

to determine the amount due from any such brother and to be brought into hotchpot as hereinbefore directed."

The testator died on December 16, 1914, leaving his daughter, brothers, and sister surviving him.

Each brother owed money to the testator. Joseph owed 1372*l.*, partly secured by mortgages; Levi owed 2581*l.*, which was unsecured; Francis owed an amount agreed at 10,000*l.*, partly secured by charges on certain shares, patents, and a freehold house.

Apart from these debts the net value of the estate was over 50,000*l.*, so that if the debts were added for the purpose of division the settled share of which each brother was life tenant exceeded his debt.

On March 14, 1917, the trustees issued this summons to determine (inter alia) whether the hotchpot clause extinguished the brothers' personal liability for their debts, and directed that they should merely be treated as advances on account of the settled shares, or whether the personal liability was still subsisting.

On May 1, 1917, a receiving order was made against Francis and he was subsequently adjudicated bankrupt. Certain accumulations of income of his settled share prior to his bankruptcy were claimed by his trustee in bankruptcy, who was added as a defendant.

Hewitt, K.C., and *Andrewes-Uthwatt*, for the trustees.

Micklem, K.C., and *Edward Beaumont* (vice *John Beaumont*, serving with His Majesty's Forces), for Levi. The hotchpot clause extinguishes the brothers' personal liability for their debts at the date of distribution: *Limpus* v. *Arnold* (1); *In re Cosier* (2), affirmed on different grounds sub nom. *Wheeler* v. *Humphreys* (3); *In re Trollope.* (4) The second sentence merely preserves the securities (if any) as charges for the benefit of the shares. The charges could be enforced by foreclosure or sale, but all personal liability on the covenants is gone. In *In re Young* (5), decided by Sargant J. on December 18, 1913, there was a clear intention to

(1) 15 Q. B. D. 300, 304, 306, 311.
(2) [1897] 1 Ch. 325, 330—333. [Omitted in Table of Cases in 1891—1900 Digest.]
(3) [1898] A. C. 506.
(4) [1915] 1 Ch. 853, 866.
(5) [1914] 1 Ch. 581, 976.

ASTBURY J. 1917 BARKER, *In re.* GILBEY *v.* BARKER.

keep the debts alive during the widow's life, but there was no decision as to what was to happen at the date of distribution. *In re Cosier* (1) was not cited, and the general effect of an ordinary hotchpot clause was not dealt with. The case turned on the special words of the particular will, and we have ascertained that in the Court of Appeal on April 30, 1914, Cozens-Hardy M.R. expressed his regret "that it was thought necessary to cumber the pages of the Law Reports with a case which cannot possibly be of any assistance in deciding any other case, or in the administration of justice." In *In re Warde* (2), decided by Sargant J. on March 9, 1914, it was held on construction that the hotchpot clause did not apply to debts, so that the present point did not really arise.

Harman, for Joseph and his son, and *Austen-Cartmell*, for Francis' trustee in bankruptcy, adopted the same arguments.

Hon. Frank Russell, K.C., and *Bryan Farrer*, for Francis' children. This is not really a hotchpot clause at all. The respective debts are not thrown into the general mass of the estate. They are allocated to the respective settled shares. Surely they are kept alive for the benefit of those shares. That view is borne out by the provision that securities for debts shall be authorized investments and allocated to the respective settled shares. Even if the clause is treated as an ordinary hotchpot clause applying to debts, the debts are not extinguished. The observations in *Limpus* v. *Arnold* (3), *In re Cosier* (4), and *In re Trollope* (5) were directed to the case of absolute gifts, where the debtor and the legatee were the same person. Here they are different persons. The gift is in effect a gift to the trustees in trust for the debtor for life with remainder to his children. There is no authority that a debt is extinguished in such a case as that, and prima facie it would be kept alive for the children's benefit: Davidson's Precedents, 3rd ed. vol. iv. p. 158; Key and Elphinstone's Precedents, 10th ed. vol. ii. p. 893; Halsbury's Laws of England, vol. xxviii. p. 842.

Dighton Pollock, for Levi's son, adopted the same arguments.

Attwater, for Annie.

(1) [1897] 1 Ch. 325.
(2) (1914) 111 L. T. 35.
(3) 15 Q. B. D. 300, 304, 306, 311.
(4) [1897] 1 Ch. 325, 330-333.
(5) [1915] 1 Ch. 853, 866.

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ASTBURY J. (after stating the facts). The question is whether on the true construction of this will and in the events that have happened the personal liability of the brothers in respect of the moneys owing by them respectively to the testator at the date of his death was released by the will, or whether that liability is still subsisting.

A large number of authorities have very properly been referred to, and it is argued that the effect of a hotchpot clause referring expressly to debts is ipso facto to extinguish the debts in question.

I conceive this may differ in different cases. In the first place, if a testator makes an absolute gift to a debtor and directs that his debt shall be brought into hotchpot, the debt is extinguished, certainly in the case where the share given by the will exceeds the amount of the debt.

I do not propose to discuss now, because it is not in issue here, whether in that case, if the debt exceeded the amount of the share, a mere hotchpot clause, without more, would extinguish the balance of the debt.

Another case, however, which is the case before me, is whether, when a hotchpot clause expressly referring to debts is applied to a share which is settled by the testator upon the debtor for life with remainders over, any such extinguishment can be validly contended for.

There is no magic, I think, in the use of the word "hotchpot," and the sole question I have to decide is whether there is sufficient in this will to extinguish or to release these debts. Apart from authority, I should have thought there was clearly nothing of the kind. The testator directs that one fifth share shall be given to each of these brothers, or appropriated, rather, to the settlement upon the brother and his children, and he directs that in making that division or appropriation any debt owing by that brother at the date of the testator's decease shall be brought into hotchpot and treated as part of the share appropriated to the brother; in other words, that the beneficiaries of that settled share are to take the risk of that being a good debt or not. He then provides that any security held by him in respect of any such debt shall be deemed to be an authorized investment in respect of the settled share of which this debt is to be treated as part. That is wholly inconsistent

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with any notion that the testator had previously by reason of this hotchpot provision intended and directed that there should be no debt in respect of which any such security could be held.

As far as I know there is no case where a mere hotchpot provision has been held to release a debt to which it is made applicable in the case of a settled share without clear words of release. In the case of an absolute gift, as I have already pointed out, the necessity for such release, certainly in the case where the share exceeds the amount of the debt, is, of course, unnecessary.

Reliance has been placed upon expressions contained in a number of authorities that hotchpot clauses operate as gifts of the debts in question, and that they extinguish the debts, and other expressions of a similar character. These all appear in cases where the gift is an absolute gift to the debtor in question ; but, as Sargant J. has said in *In re Young* (1) and *In re Warde* (2), a hotchpot clause referring to an advance is primarily a charging and not a discharging clause. If a testator desires to extinguish a debt, especially in the case where the absolute interest in the share in question is not given to the debtor, I think that it is necessary that he should use some expression showing that intention over and above a mere direction that the debt is to be brought into account or hotchpot and treated as part of the share.

As far as the precedent books go, the same view seems to have been held. In Davidson's Precedents, 3rd ed. vol. iv. p. 158, which I referred to in *In re Trollope* (3), the learned author draws a distinction between a share given absolutely and a settled share, and he says that in the case of a settled share where there are debts that it is desired to keep alive the provision ought to be that they shall be appropriated and held in part satisfaction of the share given to the debtor under the will, whereas if it is intended to extinguish them provision for that ought to be made, and in the clause or precedent which he gives to carry that out it is noticeable that there is a distinct release by the testator of the debts in addition to the provision for bringing them into hotchpot.

For these reasons I am of opinion that in this present will there is no sufficient release or extinguishment of these debts to operate

(1) [1914] 1 Ch. 581, 586. (2) 111 L. T. 35.
(3) [1915] 1 Ch. 853, 865.

as a release of the debtors, and that the question must be answered accordingly.

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Solicitors: *Baileys, Shaw & Gillett; Kingsford, Dorman & Co., for Howlett & Whitehead, Maidstone; Wedlake, Letts & Birds; Solicitor to Board of Trade; Chester, Broome & Griffithes.*

G. R. A.

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Nov. 13, 14, 21.

[1917 W. 658.]

Discovery—Particulars—Traverse of Plaintiff's Negative Allegation—Onus on Plaintiff—Particulars of Traverse—Rules of the Supreme Court, Order XIX., *r.* 7.

Where the onus of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation.

Dictum of Collins L.J. in *Alman* v. *Oppert* [1901] 2 K. B. 576, 578, not followed.

Such a traverse is not a "matter stated" within Order XIX., r. 7.

APPLICATION FOR PARTICULARS OF DEFENCE.

In 1895 the plaintiff, a British subject, became a member of the Stock Exchange, the rules and regulations of which are fully set out in *Cassel* v. *Inglis*. (1) The following two rules are material to this report.

Rule 21 provides that the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant.

Rule 35 provides that a member, intending to object to the re-election of a member, the admission of a member, or the readmission of a defaulter, shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot.

On February 15, 1917, the plaintiff, who had applied for re-election, received a letter from the committee stating that a notice of objection under rule 35 had been lodged "on the ground of

(1) [1916] 2 Ch. 211.

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your enemy birth" and stating that his application would receive special consideration on or after March 5 and suggesting that before that date he should send a written statement of all facts he desired to bring to the committee's notice, and inquiring whether he had any further evidence of denationalization in the country of his birth beyond that furnished in 1915, and whether he was at present in the United Kingdom, and whether he had been out of it during the war.

On February 19, 1917, the plaintiff replied that he came to England in 1887 at the age of twenty. At the earliest possible date, namely, five years later, he was naturalized as a British subject and denationalized in Germany. He had been in business in London since 1887. He had not been out of England since the war, and in fact had not left the country for more than three weeks at a time since 1887. In 1896 he married an Englishwoman, and his family consisted of two unmarried girls and two boys, the latter aged fifteen and thirteen. He had always been a loyal British subject, and he submitted that there could not possibly be any good ground for the objection made to his re-election.

On March 8, 1917, the plaintiff attended a meeting of the committee, but was not asked any question as to the statements in his letter, and on the same day he received notice that he was not re-elected.

On April 5, 1917, he commenced this action impugning the defendant committee's decision.

In paragraph 5 of the statement of claim he alleged (inter alia) that nothing had occurred since his election in 1895, or now existed, to render him ineligible for re-election. In paragraph 6 he set out the committee's letter of February 15, 1917, and his reply of February 19, 1917, and alleged that the statements in his own letter were true. In paragraph 9 he alleged that in declining to re-elect him the committee did not exercise any discretion either bona fide, fairly, reasonably, or judicially, but had acted arbitrarily. There were no facts or ground upon which the committee could exercise any discretion against his re-election. No reasons or facts were adduced to the committee, nor did any such exist, which could have legitimately operated, or did operate, in the minds of the committee to induce them properly to decide that he was not

eligible for re-election. In paragraph 10 he alleged that the committee's decision was against natural justice and was not a proper exercise of their judicial discretion. He claimed that the committee's decision was invalid and inoperative, and that he was entitled to re-election.

By paragraph 5 of their defence the committee traversed paragraph 5 of the statement of claim. By paragraph 6 they admitted the writing and receipt of the letters set out in paragraph 6 of the statement of claim, but made no admission as to any of the matters alleged in that paragraph. By paragraph 9 they alleged that the committee, acting bona fide and honestly in the exercise of their duty and discretion under rule 21, did not re-elect the plaintiff because they did not deem him eligible to be a member of the Stock Exchange for the year in question, and for no other reason. By paragraph 10 they traversed and put in issue each and every allegation of fact contained in paragraphs 9 and 10 of the statement of claim.

The plaintiff applied for particulars of the defence (inter alia) under paragraph 5 of any facts or circumstances which had occurred since 1895 to render him ineligible and of any grounds on which he was now ineligible; under paragraph 6, of which of the statements in the plaintiff's letter were untrue or incorrect, and of the respects in which they were untrue or incorrect; under paragraph 9 of any facts or grounds on which the committee founded their decision that they did not deem the plaintiff eligible to be a member of the Stock Exchange; and under paragraph 10 (*a*) of any facts or grounds upon which they could properly exercise any discretion against his re-election, (*b*) of any reason or fact addressed to the committee or existing in fact which could legitimately operate to induce them to decide that the plaintiff was not eligible, (*c*) of any fact or reason operating in the minds of the committee which induced them properly to decide that the plaintiff was not eligible.

Gore-Browne, K.C., and *Alexander Neilson*, for the plaintiff. The plaintiff is entitled to the particulars he asks. The essential issue is whether anything has occurred since 1895 to render him ineligible for re-election. The plaintiff alleges that nothing has occurred.

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The defendants traverse this allegation. That traverse amounts to a positive allegation that something has occurred. That is a "matter stated" within Order XIX., r. 7, and the defendants must give particulars.

[ASTBURY J. Unless and until the plaintiff displaces the prima facie presumption that the defendants exercised their discretion bona fide under rule 21 he is not entitled to ask their reasons: *Cassel* v. *Inglis*. (1) They have already told him of the specific objection under rule 35.]

If there are other objections under rule 35 the defendants ought clearly to give particulars. The discretion under rule 21 is not an absolute discretion. No doubt, apart from evidence to the contrary, the Court presumes bona fides. But if the plaintiff can show a prima facie case of arbitrariness or want of complete bona fides, the burden of proof is shifted. The committee would then have to meet the case, and be cross-examined as to their reasons, so that the Court could decide on their sufficiency: *Ex parte Penney* (2); *In re Coalport China Co.* (3); *In re Bede Steam Shipping Co.* (4); *Wood* v. *Woad* (5); *Blisset* v. *Daniel*. (6) In an action for malicious prosecution the plaintiff has to allege and prove absence of reasonable and probable cause, but the defendant has nevertheless to give particulars of the reasonable and probable cause he intends to rely on: per Collins L.J. in *Alman* v. *Oppert*. (7) The traverse of the statements in the plaintiff's letter of February 19 is evasive. The defendants ought to say which facts they intend to dispute so that the plaintiff may know what case he has to meet: *Thorp* v. *Holdsworth* (8); *Philipps* v. *Philipps* (9); *Ratcliffe* v. *Evans* (10); *Attorney-General* v. *Sheffield Corporation*. (11) That is the object of particulars: *Spedding* v. *Fitzpatrick* (12); and the principle applies equally to a positive allegation or the traverse of a negative allegation.

Upjohn, K.C., Hon. Frank Russell, K.C., and *Douglas M.*

(1) [1916] 2 Ch. 211.
(2) (1872) L. R. 8 Ch. 446, 450.
(3) [1895] 2 Ch. 404, 409.
(4) [1917] 1 Ch. 123.
(5) (1874) L. R. 9 Ex. 190, 196.
(6) (1853) 10 Hare, 493.
(7) [1901] 2 K. B. 576, 578.
(8) (1876) 3 Ch. D. 637.
(9) (1878) 4 Q. B. D. 127, 139.
(10) [1892] 2 Q. B. 524, 532, 533.
(11) [1912] W. N. 68; 106 L. T. 367.
(12) (1888) 38 Ch. D. 410, 413.

Hogg, K.C., for the defendants. Although Order XIX. in effect abolishes the plea of the general issue and requires specific denials of the plaintiff's allegations, it does not alter the onus of proof. Where the onus of proving an allegation lies on the plaintiff the Court does not order particulars of a traverse: Annual Practice, 1918, p. 345; Yearly Practice, 1918, p. 259; *Roberts* v. *Owen* (1); *James* v. *Radnor County Council.* (2) The dictum of Collins L.J. in *Alman* v. *Oppert* (3) is a slip. It probably arose from the fact that an action for malicious prosecution usually contains a claim for false imprisonment. In false imprisonment the onus of proving reasonable and probable cause lies on the defendant, so that he has to give particulars: *Green* v. *Garbutt.* (4) But in malicious prosecution the plaintiff has to allege and prove absence of reasonable and probable cause, and the defendant can simply traverse, in which case he need not give particulars: Bullen and Leake on Pleadings, 7th ed. p. 786; *Roberts* v. *Owen.* (1) The same remarks apply to the statements in the plaintiff's letter of February 19. Whether material or immaterial, the onus of proving them lies on him. The traverse is not evasive, and the defendants cannot be asked for particulars.

Gore-Browne, K.C., in reply. There is no rule that particulars of a traverse, especially a traverse of a negative allegation, cannot be ordered. *Roberts* v. *Owen* (1) is no authority for such a broad proposition as that. The question is whether the traverse fairly informs the plaintiff of the case he has to meet. If it does not, the Court can order particulars.

Cur. adv. vult.

Nov. 21. ASTBURY J. (after stating the facts). As a general rule the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.

The only affirmative plea or defence raised by the defendants in this case is in paragraph 9 of the defence, namely, that they, acting bona fide and honestly in the exercise of their duty and

(1) (1890) 6 Times L. R. 172.
(2) (1890) 6 Times L. R. 240.
(3) [1901] 2 K. B. 576, 578.
(4) (1912) 28 Times L. R. 575.

ASTBURY J. discretion under rule 21, did not re-elect the plaintiff last March,

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because they did not deem him eligible to be a member of the Stock Exchange for the year following. The plaintiff asks, in the first place, for particulars of the facts or grounds upon which they based this decision. In my judgment he is not entitled to any such information by way of particulars. It is unnecessary to decide upon this application whether he is entitled to obtain any such information by other means. The plaintiff has alleged in paragraph 9 of his statement of claim that the defendants did not exercise any discretion bona fide, fairly, reasonably, or judicially in coming to the conclusion that they did. Unless and until he establishes a case for the defendants to answer on this issue—which is the real issue in the action as the pleadings at present stand—the Court has no jurisdiction to sit as a Court of appeal from their decision, nor will the Court presume that their action was not justified, if they do not choose to state their reasons and submit them to the Court for decision—a proceeding which they are under no obligation to adopt and which the Court on an application of this character has no right or duty to compel.

The object of particulars, as Cotton L.J. said in *Spedding* v. *Fitzpatrick* (1), is to enable the applicant "to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise." The plaintiff here knows perfectly well what case he has to meet, and what the real issue raised by the defendants in paragraph 9 of their statement of defence is. It is that they acted bona fide in accordance with their duty under the rules which bind him and them alike. Prima facie the Court will presume this, and the onus of disturbing this presumption lies upon the plaintiff: see *Ex parte Penney* (2) and *Cassel* v. *Inglis* (3) and the cases therein referred to.

This plea raised by the defendants, although in form affirmative, is in substance a traverse of the plaintiff's allegation in paragraph 9 of the statement of claim, which he must prove in whole or in part in order to succeed.

The whole of the remaining issues raised by the defence consist strictly in non-admissions or traverses of the plaintiff's allegations,

(1) 38 Ch. D. 410, 413. (2) L. R. 8 Ch. 446.
(3) [1916] 2 Ch. 211.

the onus of proving all of which rests upon him. The difficulty, if there be one, in this respect arises from the fact that the plaintiff has pleaded a large number of negatives—such, for instance, as "nothing has occurred since his election in 1895 or now exists to render him ineligible for election." "No reason or facts existed which could have legitimately operated in the minds of the defendants, nor did any facts or reasons operate in their minds to induce them properly to deem or decide that the plaintiff was not eligible for re-election." The plaintiff contends that the traverse of these negative allegations amounts to the assertion of a wide and undefined positive; and submits, in the second place, that he ought not to be forced to trial without notice of any facts or circumstances known to the defendants rendering him, or believed by them to render him, ineligible for re-election, which on these traverses, as they stand, could at the hearing be affirmatively proved or raised against him.

This may sound plausible, and if the plaintiff were likely to be injured by the defendants unfairly adopting any such course at the hearing, or if the pleadings disclosed any design on their part to take advantage unfairly of any such position, it might be the duty of the Court to guard against it; but I do not think that this is at all the true view of the position as disclosed by the present pleadings. The defendants have informed the plaintiff of the only objection to his re-election made to them under rule 35, and he has dealt with this in his letter of February 19. The whole remainder of the defence is a reliance on the part of the committee upon the discretion vested in them under rule 21, which it is their duty to safeguard. For the rest they properly leave the plaintiff to prove his own case. For this latter purpose a traverse of his allegations is necessary. If the defendants were to attempt at the hearing to prove some affirmative case against the plaintiff other than that pleaded by them in paragraph 9 of the defence, and of which no previous notice had been given to him, the Court would have full power to prevent any injustice being done and could by adjournment or otherwise prevent the plaintiff being taken by surprise or otherwise prejudiced. But if an order were made on this application either directing the defendants to give particulars or directing that no fact or circumstance rendering the plaintiff

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ineligible for re-election should be proved by the defendants without previous notice thereof being given, the order would not be in accordance with the authorities that I have referred to, and the non-giving of such information might, having regard to the ingenuity displayed in the statement of claim, be used, or attempted to be used, to prejudice the defendants on the main issue raised by them in paragraph 9 of their defence.

It is further said that the denial of the contents of the letter of February 19 in paragraph 6 of the defence is evasive in that it does not state which of the allegations of fact made therein are intended to be disputed. The defendants have traversed the whole of those allegations, which they are entitled to do, at the risk of costs, if they are so minded, though in reality they are here again merely putting the plaintiff to the proof of his case.

Under Order XIX., r. 7, further particulars may be ordered of any matter "stated" in any pleading requiring particulars. A traverse by a defendant, even of a negative pleaded by a plaintiff which he must establish in order to succeed, is not, in my judgment, a matter "stated" in the defence within the meaning of this rule. The rules under the Judicature Act abolishing the general issue were intended to limit and define the issues to be tried, but not to force a defendant on a traverse to undertake the burden of proving anything himself, and still less to relieve a plaintiff from any onus of proof resting solely upon him.

The plaintiff has relied in support of this application for particulars on a dictum attributed to Collins L.J. in *Alman* v. *Oppert* (1), the decision in which was that the defendants in an action under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), were liable to give particulars of the grounds of their belief, the onus of proving reasonable grounds being thrown upon them by the statute. The Lord Justice, after giving the decision in the case, is reported to have said: "There are other cases in which particulars addressed to the state of a person's mind are ordered as a matter of course, for instance, in an action for malicious prosecution, particulars going to the question whether the defendant had reasonable and probable cause for what he did." In actions for malicious prosecution, where the defendant confines himself to traversing the plain-

(1) [1901] 2 K. B. 576, 578.

tiff's negative allegation of want of reasonable and probable cause, and where no claim is joined for false imprisonment, in which case an onus is thrown on the defendant, it has not been the practice to order particulars from the defendant (see Bullen and Leake on Pleadings, 6th ed., p. 877, and 7th ed., p. 786) except perhaps on very special grounds, as to which see *Roberts* v. *Owen*. (1)

In the present case, however, the reason for not ordering particulars of the defendants' traverse is much stronger than in the case of malicious prosecution. Here the defendants plead that they had a discretion and a duty to act as they did, under a contract binding upon both the plaintiff and themselves, in the exercise and performance of which they cannot, at all events in the first instance, be called upon to disclose the reasons for their action, and, being in a fiduciary position, they ought not to be prejudiced in this defence because they decline to admit a number of ingeniously pleaded negative allegations, the onus of proving which is upon the plaintiff and the non-traverse of which by the defendants would entitle him to judgment.

For these reasons I am of opinion that the order proposed to be made by the Master refusing the plaintiff's application was right. The application will be dismissed, and the defendants' costs will be theirs in any event.

Solicitors: *Herbert Smith, Goss, King & Gregory; Travers-Smith, Braithwaite & Co.*

(1) 6 Times L. R. 172.

G. R. A.

ASTBURY J.
1917
Nov. 30.

In re EDWARDS.
NEWBERY *v.* EDWARDS.

[1917 E. 475.]

Apportionment—Exclusion by express Stipulation—Will—Trust for Sale—Power of Postponement—Whole Income to be applied as Income pending Sale—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 7.

The Apportionment Act, 1870, is not excluded by a power to postpone a trust for sale coupled with a direction that pending sale "the whole of the income of property actually producing income" shall be applied as from the testator's death as income.

In re Lysaght [1898] 1 Ch. 115 and *In re Meredith* [1898] W. N. 48; 67 L. J. (Ch.) 409 explained and distinguished.

ORIGINATING SUMMONS.

By his will dated November 10, 1915, a testator, after appointing his wife and the plaintiffs executors and trustees and bequeathing certain legacies free of duty, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and directed them, after payment of debts, funeral and testamentary expenses, legacies, and duties on legacies bequeathed free of duty, to hold the net proceeds upon trust to pay the income thereof to his wife during her life without power of anticipation, and subject thereto, as to both capital and income, upon trust for the testator's children, who being sons attained the age of twenty-one, or being daughters attained that age or married, in equal shares as tenants in common.

The testator then settled the daughters' shares on certain trusts for the daughters and their children.

The testator then provided as follows:—Clause 7: "I expressly authorise and request my trustees to retain in its then state of investment for such period as they in their uncontrolled discretion may think fit such part of my estate as may at the date of my decease be invested in any rubber producing limited companies. And I declare that they shall not be liable for any loss arising out of such retention. And I further declare that my trustees may postpone the sale calling in and conversion of any part of my real or personal estate for such period as they may in their absolute discretion

deem fit notwithstanding that it may be of a wasting speculative or reversionary nature, and that pending such sale calling in and conversion the whole of the income of property actually producing income shall be applied as from my death as income, and on the other hand on such sale calling in and conversion or on the falling in of any reversionary property, no part of the proceeds of such sale calling in or conversion or of such property shall be paid or applied as past income."

The testator died on July 31, 1916, leaving his wife and two infant daughters, aged three and two, surviving. His debts, funeral expenses, and legacies were duly paid.

The question arose whether dividends on stocks and shares paid after the testator's death but declared in respect of periods wholly or partially antecedent to his death were apportionable under the Apportionment Act, 1870, or whether the operation of the Act was excluded by clause 7 of the will, so that the whole of the dividends went to the life tenant.

On July 5, 1917, the plaintiffs issued this summons to determine the point.

H. M. Broughton, for the plaintiffs.

Baden Fuller, for the wife. Clause 7 of the will is an express stipulation against apportionment within s. 7 of the Act: *In re Lysaght.* (1)

[ASTBURY J. In that case there was a direction that every share in a certain company should carry the dividend accruing at the testator's death.]

Here "the whole of the income" is to be applied as income. That excludes apportionment: *In re Meredith.* (2)

[ASTBURY J. That was the gift of the whole of the income derived under a particular deed.]

Clause 7 means that whatever comes in is to be applied as income: *Jones* v. *Ogle.* (3)

Bovill, for the infant daughters. Clause 7 is merely intended to exclude the rule in *Howe* v. *Earl of Dartmouth.* (4) As between herself

(1) [1898] 1 Ch. 115. (Ch.) 409.
(2) [1898] W. N. 48; 67 L. J. (3) (1872) L. R. 8 Ch. 192, 196.
(4) (1802) 7 Ves. 137a.

ASTBURY J. and her children the wife is entitled to the whole income of wasting securities as from the testator's death, but there is no direction that income accruing prior to his death, which prima facie forms part of the capital of his estate, is to be decapitalized and treated as income for the wife's benefit.

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EDWARDS, *In re.* NEWBERY *v.* EDWARDS.

ASTBURY J. (after stating the facts). The wife contends that clause 7 of the will is a direction that all dividends paid after the testator's death shall be free from the provisions of the Apportionment Act, so that the whole of those dividends goes to her as income. She relies mainly on two authorities, namely, *In re Lysaght* (1) and *In re Meredith.* (2)

Now the true effect of those two authorities is accurately stated in Theobald on Wills, 7th ed. p. 186. The learned author says: "The Act does not extend to any case in which it is expressly stipulated that no apportionment shall take place (see s. 7). It does not, therefore, apply if there is a direction that every share given by the will shall carry the dividend accruing thereon at the testator's death: *In re Lysaght* (1); or if the gift is of the whole of the income derived under a particular deed: *In re Meredith.*" (2)

I should be quite content to rest my judgment on that statement of the effect of those two cases, but perhaps I may add a few words thereon.

In *In re Lysaght* (1) there was a provision that certain shares bequeathed by the will should "carry the dividend accruing thereon" at the testator's death. The shares were bequeathed to the trustees on trust for sale, with a power of postponement. They were to "receive the annual produce" of the proceeds of sale and of the unsold shares and hold the same in trust for certain life tenants and remaindermen. The Court of Appeal held that the first provision excluded the Apportionment Act and carried the dividend accruing at the testator's death to the trustees as legatees of the shares, and under the subsequent clause the dividends went as annual produce to the life tenants.

In *In re Meredith* (2) a testator had assigned certain shares to the trustees of a separation deed on trust out of the dividends and annual income to pay an annuity to his wife and pay the balance of the

(1) [1898] 1 Ch. 115. (2) [1898] W. N. 48; 67 L. J. (Ch.) 409.

dividends and annual income to him. By his will, after reciting the settlement and that he was entitled to the balance of the income subject to his wife's annuity, he directed the whole income under the settlement to be paid to his wife during widowhood. There was really no matter for discussion in that case. The income under the deed was received by the trustees on trust to pay part to the wife and the balance to the testator, and the testator directed that it should all be paid to the wife. It was held that as to this income the Apportionment Act was excluded.

Neither of these authorities applies to the present case. Clause 7 of this will has nothing to do with the operative gift, and there is nothing in it to exclude the Apportionment Act. The dividends are therefore apportionable.

Solicitors: *Culross & Holt.*

N.B.—Compare *In re Wills* [1915] 1 Ch. 769, where it was held that a similar clause was insufficient to exclude the rule in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295. As to exclusion of the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), by such a clause, see *Unwin* v. *Eykyn* [1866] W. N. 268.

G. R. A.

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[1915 G. 1960.]

Education—Duty of Local Education Authority—Poor Law Guardians—Boarded-out Poor Law Children—Attendance of Children at Public Elementary School—"Maintenance" of School—Refusal of Poor Law Guardians to make special Payment towards Expenses of Education—Threat by Local Education Authority to exclude Children—Action for Injunction—Jurisdiction—Board of Education—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 3, 5, 7, 14, 18, 74, 96, 97—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *ss.* 4, 23—*Elementary Education Act*, 1891 (54 & 55 *Vict. c.* 56), *ss.* 1–5—*Elementary Education Act*, 1900 (63 & 64 *Vict. c.* 53), *s.* 2; *s.* 6, *sub-s.* 1—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 7; *Sched. III.*; *Sched. IV., Part II.—Board of Education Code of Regulations*, 1912 (*the "Code"*), *arts.* 26 (*b*), 53 (*a*)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-s.* 2 (*b*).

The duties imposed on a local education authority are defined by the Education Acts, 1870 to 1903, and the Code, which has parliamentary sanction. One of them is to provide and maintain efficient public elementary schools in their district. They must also fulfil the conditions of the Code in order to obtain the parliamentary fee grant. By art. 53 (*a*) of the Code no child may be refused admission to a public elementary school on other than reasonable grounds; and art. 26 (*b*) provides that if any question arises as to the interpretation of the Code, or as to the fulfilment of any of the conditions specified therein, the decision of the Board for the purposes of the Code shall be final.

By s. 3 of the Elementary Education Act, 1870, the term "parent" includes "guardian and every person who is liable to maintain or has the actual custody of any child"; and the Elementary Education Act, 1900, s. 2, enacts that poor law guardians "may contribute towards such of the expenses of providing, enlarging, or maintaining, any public elementary school as are certified by the Board of Education to have been incurred wholly or partly in respect of scholars taught at the school, who are . . . . boarded out by the guardians."

A local education authority, with the sanction of the Board of Education, refused to allow boarded-out poor law children resident in their district to attend their public elementary school unless the poor law guardians made a special payment towards the expenses of maintaining the school in connection with the teaching of the children. The guardians objected that they were under no duty to make a special payment and brought an action against

the education authority to restrain it from excluding the children:—

Held by the Court of Appeal: (1.) That under the Education Acts and the Code the guardians, as the parents of the boarded-out poor law children, have a statutory right to have free education given to their children attending the public elementary school, without payment of any fees whatever.

(2.) That neither the Board nor the local education authority has any power either under the Acts or the Code to require the guardians, as parents, to make any special payment towards the expenses of maintaining the school.

(3.) That the Board has no jurisdiction under the Acts or the Code to determine legal rights as between a parent and the local education authority.

(4.) That the exclusive jurisdiction conferred on the Board in the Code is limited to the purposes of the Code, namely, to determine whether the education authority has fulfilled all the conditions of the Code so as to obtain the annual parliamentary grant—e.g., whether a child was excluded from attending the school on other than reasonable grounds, such as illness, want of cleanliness, and such like matters.

Decision of Neville J. reversed.

WITNESS ACTION.

The guardians of the poor of Gateshead Union in the county of Durham (hereafter called "the guardians") were a corporation, and their union comprised several parishes some of which formed part of the county area of which the defendants were the local education authority.

The guardians were the owners of eighteen cottages at Medomsley Edge, in the parish of Benfieldside in the county of Durham. This parish was not comprised in the Gateshead Union, but was within the county area of which the defendants were the local education authority. The guardians were also the owners of other property in the parish of considerable value. Poor law children maintained by the guardians resided in the cottages under the care of foster-mothers and a superintendent, who were appointed by the guardians.

From 1900 to 1910 the children in the cottages, between five and fourteen years of age, attended the public elementary schools of the defendants in the parish of Benfieldside. In September, 1910, the defendants opened a new public elementary school at Medomsley Edge, known as the Medomsley Edge Council School, and from that time until 1915 the children between the said ages and resident in

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the cottages attended the Medomsley Edge Council School. The average number of the children from the cottages attending the said schools was about 200, and was more than half of the total average number of scholars attending the schools.

Prior to January, 1915, no request for any payment or contribution towards the expenses or costs of the education of the said children, or for any contribution towards the expenses of providing, enlarging, or maintaining any public elementary school attended by the said children, had ever been made by the defendants to the guardians. But in that month the defendants wrote to the guardians stating that the Medomsley Edge Council School was provided to relieve the over-crowding in the other schools caused by the attendance of the children residing at the cottages, and asking the guardians to make a special payment towards the annual cost for maintenance of the school in connection with the teaching of the said children, and suggesting an annual payment of 1*l.* per head for each child attending from the cottages. The guardians were unwilling to make any payment, and in their reply pointed out that, in addition to the cottages, they were the owners and occupiers of other property of substantial rateable value in the parish of Benfieldside, in respect of which (including the cottages) they paid parochial and county rates and thus contributed largely to the education expenditure of the parish. The defendants placed the matter before the Board of Education, and, after some correspondence between the parties, the Board in June, 1915, wrote to the guardians as follows (omitting formal parts) :—

"The Board have given careful consideration to the representations of the guardians, including the circumstance that they pay rates to a substantial amount in respect of property owned by them. It appears however to the Board as at present advised that in view of the terms of section 2 of the Elementary Education Act, 1900, which contemplates a contribution by the guardians in respect of children boarded out by them, it would be not unreasonable on the part of the local education authority under article 53 of the Code to exclude from school children in respect of whom a contribution was not made."

The guardians, however, maintained their objection that they were under no obligation to make any special payment on account

of the children resident in the cottages attending the school, and eventually the defendants in October, 1915, with the approval of the Board, wrote to the plaintiffs that unless an agreement for a special payment on account of the children residing in the cottages and attending the Medomsley Edge Council School was arrived at before December 31, 1915, children residing in the cottages would be refused admission to that school and any other public elementary school in the county area as from January 1, 1916. Thereupon the guardians, the foster-mothers, and the superintendent issued the writ in this action claiming (1.) a declaration that the children between the ages of five and fourteen years resident in the said cottages and maintained by the guardians were entitled to attend the Medomsley Edge Council School or any other available public elementary school in the county of Durham; (2.) a declaration that the defendants were not entitled to exclude from or refuse admission to the Medomsley Edge Council School or any other available public elementary school in the said county any of the said children; and (3.) an injunction against the defendants accordingly.

On motion for an interim injunction it was arranged that the plaintiffs, in the event of the Court at the trial of the action refusing them the relief they claimed, should pay as from January 1, 1916, at the rate of 1*l.* per annum for each of the said children resident in the said cottages who should attend the defendants' schools, and that in the meantime such children should not be excluded from such schools.

The action was tried before Neville J. on March 26, 27, 1917.

The plaintiffs in their statement of claim alleged that the defendants, in breach of their duty as the local education authority and in derogation of the rights of the plaintiffs, had wrongfully and unlawfully threatened and intended to refuse to allow the children so maintained and resident in the cottages to attend the Medomsley Edge Council School or any other public elementary school within the county area unless the guardians agreed to make a special payment in respect of the said children attending the said schools which the guardians were not under any obligation to make; and they claimed relief as above stated.

The defendants in paragraph 4 of their defence submitted that the action was not maintainable, and that any question as to their

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refusal to admit the said children to their elementary schools could be determined by the Board of Education alone; or, in the alternative, that the Court ought not in the exercise of its discretion to grant the relief asked for, but that the said question ought to be determined by the Board of Education as the special tribunal entrusted with the determination of such questions in pursuance of the statutes in that behalf made and provided.

Hon. Frank Russell, K.C., W. W. Mackenzie, K.C., and *Lawrence Tooth*, for the plaintiffs. The matter in dispute is not as to school pence which the guardians are willing to pay if they are charged, and of which they can obtain repayment under the provisions of the Local Government Act, 1888. But the issue is whether the guardians can be compelled to make a special payment on account of their boarded-out poor law children in connection with their education. The plaintiffs are " the parents " of the children within the definition of that word in s. 3 of the Elementary Education Act, 1870, and the question depends on the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 5, 7, 14, 18, 74, 96, 97; the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), ss. 4, 23, 28, 48; the Elementary Education Act, 1880 (43 & 44 Vict. c. 23), ss. 2, 4; the Elementary Education Act, 1891 (54 & 55 Vict. c. 56), ss. 1, 2, 3, 4, 5; the Elementary Education (Blind and Deaf Children) Act, 1893 (56 & 57 Vict. c. 42), ss. 1, 2; the Elementary Education (School Attendance) Act, 1893 (56 & 57 Vict. c. 51), s. 1; the Elementary Education (Defective and Epileptic Children) Act, 1899 (62 & 63 Vict. c. 32), ss. 2, 9, 10; the Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 1; the Elementary Education Act, 1900 (63 & 64 Vict. c. 53), ss. 2, 6; the Education Act, 1902 (2 Edw. 7, c. 42), ss. 1, 5, 7, 8, 9, 10, 15, 16, 18, 25, Sched. III., sub-s. 5; the Board of Education 1912 Code of Regulations for Elementary Schools in England (known as the Code);' and the by-laws of the defendants. We contend: (1.) Under these Acts it is the duty of a parent to send his child to a public elementary school unless the child is under efficient instruction in some other manner, and it is the duty of the education authority to provide sufficient school accommodation and education. (2.) The parent is entitled to send his child to a public elementary school in the district in which the child resides without any special

payment. (3.) There is nothing in the Acts about pauper children except in the cases of (*a*) blind and deaf children and (*b*) defective and epileptic children. Therefore the guardians, like any other parents, are entitled to have the poor law children under their care educated at a public elementary school in the district in which the children reside without any special payment. (4.) The Act of 1900, s. 2, which provides that poor law guardians "may contribute" towards the expenses of providing or maintaining any public elementary school, is not an imperative but only an enabling enactment. Moreover, the defendants under the powers given them by the Act of 1902 charged one half of the expense of providing the new Medomsley Council School on the rates of Benfieldside parish, for which the plaintiffs as ratepayers were of course liable to pay rateably and which they have paid. (5.) The functions of the Code are educational. It lays down the syllabus and course of instruction to be followed and the conditions to be fulfilled by an education authority under the directions of the Board of Education in order to obtain the parliamentary fee grant: *Reg.* v. *Cockerton.* (1) But it is no part of the imperative provisions of the Acts, and does not justify the defendants in excluding the plaintiffs from exercising their right to send their children to the school unless there is a reasonable cause, such as illness. Art. 26 (*b*) of the Code only applies to disputes between the education authority and the Board as to the fulfilment of the conditions, and is not intended to apply to a case like the present.

The defendants may rely on s. 16 of the Act of 1902, which gives a remedy by mandamus, but the Board have not purported to act under that section, which only applies to a case of nonfeasance and not to a misfeasance. What the defendants are threatening and intending to do is an act of misfeasance which the Court has jurisdiction to restrain by injunction: *Wilford* v. *West Riding of Yorkshire County Council* (2); *Attorney-General* v. *Ashbourne Recreation Ground Co.* (3) [They also referred to the Poor Law Order of July 24, 1847, art. 114, n., and the Poor Law Order of January 30, 1897, arts. 10, 11: see Glen's Poor Law Orders, 11th ed. pp. 310-

(1) [1901] 1 K. B. 322, 354, 359; affirmed on appeal, [1901] 1 K. B. 726.

(2) [1908] 1 K. B. 685, 690-2, 704.

(3) [1903] 1 Ch. 101, 106-7.

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311, 1232, and the Poor Law Institutions Order of December 30, 1913, art. 25; see Statutory Rules and Orders, 1913, pp. 1670, 1718.]

P. O. Lawrence, K.C., and *Harman* (for *W. Tyldesley Jones*, serving with His Majesty's Forces), for the defendants. The real question is not as to the right of a parent to send his child to a public elementary school, but as to the right of a local education authority to exclude, i.e. to refuse to admit, a child, and that is left entirely to the Board of Education to decide. There is nothing in any of the Acts that imposes a duty on a local education authority to admit a child, but it is laid down in the Code. The statutory obligations of a school authority under the Acts are (*a*) to provide sufficient public school accommodation without payment of fees——the Act of 1870, ss. 5, 18; the Act of 1891, s. 5; the Act of 1902, Sched. III., s. 5: (*b*) to conduct the school in accordance with the regulations of the Code in such a manner as to obtain the fee grant —the Act of 1870, s. 7, sub-s. 4, ss. 14, 96, 97; the Act of 1902, s. 7, sub-s. 4: (*c*) to maintain and keep efficient all public elementary schools in their district—the Act of 1870, s. 18; the Act of 1902, s. 7: and (*d*) to make by-laws for the attendance of children—the Act of 1870, s. 7, sub-s. 4, s. 74; the Act of 1880, s. 2. That is all, and the whole scheme of the Legislature is to leave everything else to the Board of Education. The machinery for enforcing the obligations in ss. 8, 9, and 63 of the Act of 1870 is now replaced by s. 16 of the Act of 1902 and arts. 26 and 53 of the Code. We say, first, that there is no statutory obligation on the defendants as the local education authority to admit or refuse to admit any particular child or children to a public elementary school. Secondly, that any obligation not to refuse admission except on reasonable ground is to be found only in the Code, and the penalty for breach of the obligation is the loss of the fee grant, and then the school ceases to be a public elementary school and would have to be closed. Thirdly, that if the Acts and the Code together impose an obligation to admit children, the Code provides an appropriate remedy in case of wrongful exclusion which is exclusive and the jurisdiction of the Court is ousted. Fourthly, that if the Court has jurisdiction, it will not interfere either by declaration or injunction in a case like this. The practice as to refusal to admit is stated in Hugh Owen's Education Acts, 20th ed. p. 459, n. The Code has parliamentary sanction,

and every day under its regulations the Board are deciding questions between parents and school authorities as to the admission of children. The observation of Channell J. in *Wilford* v. *West Riding of Yorkshire County Council* (1) that parents have rights on the principle that rights and obligations are correlative is only a dictum, but if the right of the parent and the duty of the education authority are coextensive, and the refusal to admit is reasonable, the parent has no enforceable right. As to s. 2 of the Act of 1900, it is submitted that "maintaining" a school includes the instruction given in the school, and that the section would have been nugatory if the Board could not under the Code justify non-contribution to expenses as a reasonable excuse for excluding children. The Code expressly provides for the admission of children, and art. 26 (*b*) says that any question raised under the Code shall be decided by the Board. Where a special remedy is given by statute for enforcing a statutory obligation the Court will not interfere, but will leave the party to his statutory remedy: *Doe* v. *Bridges* (2); *Pasmore* v. *Oswaldtwistle Urban Council* (3); *Wolverhampton New Waterworks Co.* v. *Hawkesford* (4); *Blencowe* v. *Northamptonshire County Council* (5); *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (6) The analogy of those decisions applies to this case. Here the remedy is in the Code, and the decision of the Board is final. The Acts of 1893 and 1899 as to blind and deaf children and defective and epileptic children have no bearing on the present case. They provide special legislation for special classes of afflicted children. It is true that under s. 18 of the Act of 1902 part of the expenses of providing this school was charged on Benfieldside parish, but the contribution we are asking for is not towards the expenses of providing the school, but towards the annual expenditure for "maintaining" the school so far as it is increased by the number of these children attending the school.

Lawrence Tooth in reply.

NEVILLE J. The question to be determined in the present case can be reduced to very narrow limits although the underlying

(1) [1908] 1 K. B. 685, 704.
(2) (1831) 1 B. & Ad. 847, 859.
(3) [1898] A. C. 387, 394.
(4) (1859) 6 C. B. (N.S.) 336, 356.
(5) [1907] 1 Ch. 504, 523.
(6) [1898] 2 Ch. 331, 334-5.

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principles are no doubt of great importance. In the first place, a general question of jurisdiction has been argued: whether the Legislature has substituted the Board of Education for the Courts of law with regard to these matters. That, no doubt, is a question of extreme importance. But I do not think it really arises here, because I think the argument of the plaintiffs breaks down in its inception. It appears to me that there is no question here to be determined as to any conflict of jurisdiction betweeen the Courts and the Board of Education. What has to be ascertained in the first place is, what rights has the Legislature given to the parents in respect of the education of their children under the Education Acts? One thing is plain, and that is that there is an obligation imposed on the parents to send their children to the educational establishments provided, namely, the public elementary schools, and if the matter stopped there I should think that a reciprocal obligation would be implied, and that when it is said to a parent "You shall send your child to a public elementary school," that must involve the obligation on the part of the public elementary school to receive the child when he puts in an appearance. But that is a point that does not arise here, because it appears to me that the obligation of the local education authority is imposed and defined by the Education Acts themselves, and that it would be contrary to established principles, where an express obligation is imposed, to imply a further obligation as necessarily reciprocal to the obligation imposed on the parents. I think, therefore, what I have to do is to examine the Acts and see what obligations have been imposed on the local education authority. So far as is material for the present purpose there is of course the obligation to provide and maintain sufficient accommodation for the instruction of children within the defined ages, and there is the obligation to maintain the schools in which such accommodation is provided, and I think that "maintaining" a school includes the instruction given in it as well as the structure of the building itself. When you speak of a school, that means something more than the walls and the benches, it means the establishment at which certain instruction is imparted; and "to provide and maintain" must, having regard to the subject-matter which the Acts are dealing with, apply to the instruction as well as the building. The only important obligation, in my opinion, imposed upon the local educa-

tion authority for the present purpose is that they are bound by the words of the Acts to fulfil the conditions laid down in the Code. One of those conditions, 53 (*a*) of the Code, is that "No child may be refused admission to a public elementary school on other than reasonable grounds." But then comes the consideration of the meaning of 26 (*b*) in the Code: "If any question arises as to the interpretation of this Code, or as to the fulfilment of any of the conditions specified therein, the decision of the Board for the purposes of this Code shall be final." I think that must mean that, inasmuch as the local education authority have to fulfil the conditions of the Code, they must fulfil the conditions of 53 (*a*); but whether they have fulfilled the conditions of 53 (*a*) or not seems to me a matter expressly reserved for the final decision of the Board of Education under 26 (*b*). Therefore I think the statutory obligation of the local education authority in this regard is not one that can be enforced by the Courts of law, but is limited by the very terms of the enactments to the fulfilment of the conditions contained in the Code, and that whether those conditions have been fulfilled or not is a matter exclusively reserved for the determination of the Board of Education. I am of opinion, therefore, on that short ground that in this case there is no obligation imposed by the Acts on the local education authority beyond the obligation to fulfil the conditions of the Code, the fulfilment of which is to be expressly determined by the Board of Education, and therefore the Court has nothing to act upon. The action must therefore be dismissed with costs. I do not think there is any difference in the rights of any of the different plaintiffs for the purpose of the conclusion at which I have arrived. I draw no distinction between them, because I think the foster-mothers and the superintendent, who have the actual custody of the children, may be regarded as the agents of the guardians.

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The plaintiffs appealed. The appeal was heard on October 15, 16, 1917.

Hon. Frank Russell, K.C., and *Lawrence Tooth*, for the appellants.

P. O. Lawrence, K.C., and *Harman* (for *W. E. Tyldesley Jones*, serving with His Majesty's Forces), for the respondents.

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The arguments used in the Court below were substantially repeated. The following additional case was cited: *Rex* v. *Board of Education*. (1)

Nov. 9. The following written judgments were delivered:—

SWINFEN EADY L.J. This appeal raises the important question whether parents, who under the provisions of the Elementary Education Acts are bound to cause their children to attend school under a penalty enforceable by fine and imprisonment, have a corresponding right to the free education of their children at school. The defendants, who are the local education authority, deny that they are under any legal obligation to give free education; where they consider that the parent is of sufficient ability to pay, or where for other reasons they consider that a payment ought to be made, they claim the right to require a money payment or contribution, and to refuse to receive a child if this payment is not made. They contend that the only risk they run by refusing to receive a child is that the Board of Education may determine that they have refused the admission of a child "to a public elementary school on other than reasonable grounds" contrary to the Education Code; if so, they have not complied with the conditions of the Code required to be fulfilled to obtain an annual grant and cease to be a public elementary school. They further say that the practice is to ascertain, before actually refusing a child, whether the Board of Education will consider the ground on which they propose to refuse a reasonable ground, and that, under another provision of the Code, if any question arises as to the fulfilment of any of the conditions of the Code the decision of the Board for the purposes of the Code is final. The result claimed is, therefore, that the Board of Education may consider the pecuniary position of parents and determine finally and without appeal, and, indeed, without any provision for hearing the parent (and through the medium of a decision as to whether the school has fulfilled the conditions of the Code), whether the parent shall enjoy the blessings of free education for his children. And by free education I mean without being required to make any money payment, whether it be

(1) [1910] 2 K. B. 165, 182.

called school fees, or pence, or a contribution to the expenses of maintaining the school, or by any other name or description.

The question arises in this way. The plaintiffs are the guardians of the Gateshead Union. Of the parishes comprised in the union, the parish of Gateshead is a county borough and the parish of Heworth is an urban district, and each is a primary education authority. The other parishes of the union are severally within the geographical county of Durham, and are part of the county area for which the defendants are the local education authority. The guardians own a number of cottages at Medomsley Edge in the county of Durham, and they board out a number of poor children in these cottages under the care of foster-mothers. The defendants have a public elementary school at Medomsley Edge which these children attend. The defendants, as the local education authority, are in receipt of an annual parliamentary grant, and also of a fee grant in respect of each of the children attending this Medomsley Edge Council School, which was opened in the year 1910. It is admitted that from the opening of the school to the present time there has been, and there is now, sufficient school accommodation for these children. The defendants do not draw any distinction between children originally coming from parishes within the plaintiffs' union which are also within the defendants' educational district and children drawn from parishes within the plaintiffs' union but not within the defendants' educational district. They claim the right to be paid, in the form of a contribution to expenses, in respect of all children boarded out by the plaintiffs and attending the Medomsley Edge Council School.

This action is brought to determine the legal position, but in the meantime, that the poor children may not suffer, an arrangement has been come to between the two public bodies under which the children are continuously receiving the usual education provided at the school. No question is raised in these proceedings with regard to order or cleanliness as regards the children, or any disciplinary measures. The sole question is whether the defendants can refuse to receive the children unless payment is made for them—in other words, whether "parents" have any right to the free education of their children under the provisions of the Education Acts now in force.

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The sum demanded by the defendants is, I understand, 1*l.* per head per annum in respect of each child boarded out by the guardians. The children in question form at present about two-thirds of the whole school. The plaintiff James George Law is the superintendent, appointed by the guardians, of the cottages and of the children residing in them, and the remaining plaintiffs are the respective foster-mothers residing in the cottages.

By the Elementary Education Act, 1870, s. 3, "parent" includes "guardian and every person who is liable to maintain or has the actual custody of any child." The plaintiffs respectively are, therefore, "parents" within the meaning of the Act. By s. 5 of the Act of 1870 there shall be provided for every school district a sufficient amount of accommodation in public elementary schools available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made. That accommodation is referred to as "public school accommodation." This section is repealed by the Education Act, 1902, Sched. IV., Part II., except so far as it defines "public school accommodation," and by s. 5 of the Act of 1902 the local education authority throughout their area are to have the powers and duties of a school board. Thus the defendants have the duty of providing "public school accommodation," as defined by the Act of 1870, within their district.

By s. 74 of the Act of 1870 power is given to make by-laws for requiring the parents of children of such age, not less than five years nor more than thirteen years,—now it is fourteen years under s. 6, sub-s. 1, of the Education Act, 1900—as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school and determining the time during which children are so to attend school; and any penalty for breach of a by-law may be recovered in a summary manner. Under the model by-laws framed by the Board of Education the age is fixed at not less than five nor more than fourteen years, and the time of attendance "shall be the whole time for which the school selected shall be open for the instruction of children of similar age."

By the Elementary Education Act, 1876, s. 4, it shall be the duty of the parent of every child—that is, between the ages of five and fourteen so fixed—to cause such child to receive efficient elementary

instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty he is liable to the orders and penalties provided by that Act. In default an attendance order can be made and enforced; and by s. 23 it is provided that it shall be the duty of every local education authority to enforce the by-laws.

Under the Education Act, 1891, school fees, or school pence, were abolished in the vast majority of cases. Sect. 5 of that Act is now repealed and replaced by Sched. III., par. 5, of the Education Act, 1902, which provides that "the duty of a local education authority under the Education Acts, 1870 to 1902, to provide a sufficient amount of public school accommodation, shall include the duty to provide a sufficient amount of public school accommodation, without payment of fees, in every part of their area."

The defendants, who claim to be paid 1*l.* per head per annum for each child, which works out at about 6*d.* per week for the school weeks, do not claim it as school fees. The reason is that if the guardians pay the school fees of pauper children the amount is repayable to them by the local education authority under the provisions of the Local Government Act, 1888, s. 24, sub-s. 2 (*b*). The amount is therefore claimed as a "special payment," as a contribution towards the expenses of maintaining the defendants' school. By virtue of s. 2 of the Elementary Education Act, 1900, the guardians were empowered (not required) to contribute to the expenses of a public elementary school; but this statute was passed before the county council were the local education authority, and it enabled guardians, by a payment out of the common fund of the union, to distribute expenses over the whole union which otherwise would have been borne by the parish in which the elementary school was situated. When school boards were abolished in 1902, and the expenses of a county council as a local education authority were ordered to be paid out of the county fund, the hardship of the expense of educating children drawn from the whole union at the cost of one parish only no longer existed.

I am of opinion that the Acts which require a parent to cause his children to attend school give him the right to comply with their provisions and enable him to insist that the child which he tenders shall be permitted to "attend" school—that is, to be and remain at the school—during school hours and receive the instruction which

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similar children receive, and that the defendants have not any right to refuse to receive his child unless they receive some payment or money contribution. He is entitled to free education for his child—that is, education without making any payment whatever. The accommodation in the school cannot be said to have been made "available" for children if they are refused admission unless and until their parents comply with some request to pay money which the statutes do not confer upon the local education authority any right to demand.

It was urged that the only obligation on the defendants was to provide the school, to maintain and keep it efficient, to conduct it in accordance with the conditions required to be fulfilled to obtain the parliamentary grant (namely, those contained in the Minutes of the Education Department, or, as it is now called, the Education Code), and not to refuse admission to a public elementary school on other than reasonable grounds. The Education Code provides, art. 26 (*b*), that if any question arises as to the interpretation of the Code, or as to the fulfilment of any of the conditions specified therein, the decision of the Board for the purposes of that Code shall be final. It was insisted that, having regard to this provision, it was the Board of Education which alone could determine (and determine finally) whether the plaintiffs' children had been unreasonably excluded; that if they determined it in the negative that decision was final and binding, and if they determined it in the affirmative the only result was that, not having complied with the Code, the defendants would not be entitled to obtain the annual grant and the school might cease to be a public elementary school. This argument appears to me to be founded on a misconception. If a parent has a legal right to free education for his child at a public elementary school, the Board of Education cannot, nor can the local education authority, take it away. The statute does not confer upon the Board any power to determine the legal right as between a parent and the school authority. The decision of the Board is only expressed to be final for the purposes of the Code. The Board may determine whether a child has been refused admission to a public elementary school, on other than reasonable grounds, for the purpose of deciding whether the conditions to obtain an annual grant have been fulfilled by the school or education authority, but

not for the purpose of determining the legal rights of the parent. Compliance with the Code is a condition of earning the grant.

In my judgment the plaintiffs are entitled to the declaration for which they ask—namely, a declaration that the plaintiffs are entitled to send the children in the statement of claim mentioned to any public elementary school within the district in which the children reside, if there is room for them, unless there is some reasonable ground for excluding them not inconsistent with the right of the parents to the free education of the same children.

WARRINGTON L.J. The defendants in this action, the Durham County Council, are sued as the local education authority. The plaintiffs are the guardians of the poor of Gateshead Union and certain other persons; they or some or all of them together are liable to maintain, or have the actual custody of, certain children, and are therefore the "parents" of such children for the purposes of the Education Acts.

The question is whether the plaintiffs are entitled, as such parents, to require the defendants to allow their children to attend a public elementary school without payment, the defendants having refused to allow the children to attend unless the guardians make an agreement with them for payment of a contribution in respect of such children to the expenses of the school. Neville J. has held that the plaintiffs are not entitled to the right they claim and has dismissed the action.

The Gateshead Union includes the county borough of Gateshead and the Heworth urban district, which have separate education authorities. The rest of the union is within the area for which the defendants are the local education authority. The plaintiffs the guardians have adopted the now common practice of boarding out their pauper children, and for this purpose have acquired or built certain cottages at Medomsley Edge within the area of the defendants as the local education authority but outside the district of their own union. They have appointed the plaintiff Law as the superintendent of the cottages and the other plaintiffs as the foster-mothers of the children boarded therein respectively. The children are therefore resident in the area of which the defendants are the local education authority. There are

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at present about 190 children in the cottages, of whom 170, or thereabouts, come from those parts of the Gateshead Union which are not within the defendants' district. The defendants have provided, and are maintaining as a public elementary school, a school at Medomsley Edge within a short distance of the cottages. There is room in the school for the children in question, and the plaintiffs desire to send them there. The defendants, however, require as a condition of their being allowed to attend that the guardians should contribute to the expenses of the school under the power conferred upon them by s. 2 of the Elementary Education Act, 1900. The guardians deny the right of the defendants to impose such a condition, and insist that as the "parents" of children resident in the area they are entitled to have their children educated at the school without payment. Pending the action arrangements have been made for the education of the children at the school. The Board of Education have intimated to the defendants that they are prepared to treat the refusal of the plaintiffs to contribute to the expenses as a reasonable ground for the refusal of the defendants to admit the children to the school within the meaning of art. 53 (*a*) of their code of regulations. Neville J. has held that, whatever obligations may be imposed by the Education Acts themselves upon the defendants as to the admission of children to their schools, they are entitled under the Code to refuse admission on reasonable grounds, and that the Board of Education, and not the Court, are the judges of what is reasonable. On this ground he has dismissed the action. In reference to the view expressed by the learned judge I may say, with the greatest respect, that in my opinion the provisions of the Code do not affect the question we have to determine, but are merely regulations made by the Board the fulfilment of which is a condition precedent to the obtaining by the school in question of a share in the parliamentary grant (see s. 97 of the Act of 1870). They do not affect or modify such right, if any, as the parent possesses under the statutes to have free education for his children; the question we have to determine is whether the parent has such a right. The plaintiffs contend that the local education authority are under a statutory obligation to permit a parent of a child residing in that district to cause such child to attend a public elementary school in the district and are not

entitled to require payment in any form for the education the child receives; they, of course, admit that a child may be refused admission on reasonable grounds not connected with the non-payment of money, as for example that he is in such a condition of person or health as to render contact with him offensive or dangerous to others, or is guilty of conduct prejudicial to good discipline.

The powers and duties of the local education authority are derived from and imposed by the Education Act, 1902. Under s. 5 of that Act the local education authority have the powers and duties of a school board under the Act of 1870 and subsequent Education Acts. Amongst other duties is that imposed by s. 18 of the Act of 1870 to maintain and keep efficient schools provided by the school board, and such additional school accommodation as, in the opinion of the Board of Education, is necessary in order to supply a sufficient amount of public school accommodation for their district. "Public school accommodation" means accommodation in public elementary schools available for all the children resident in such district (see s. 5 of the Act of 1870, which is in this respect still in operation notwithstanding its repeal by the Act of 1902). Under s. 7 of the Act of 1902 they are to maintain and keep efficient all public elementary schools within their area. The school in question has been provided under the obligation imposed by s. 18 of the Act of 1870. In my opinion it is clear that the obligation to maintain and keep efficient is to maintain and keep the school as a school, that is to say, as a means of giving elementary education to children, and that such education is to be available for children resident in the area without distinction.

Then, as to the gratuitous nature of the education to be provided, it is enacted by s. 2 of the Elementary Education Act, 1891, that in schools of a class to which the school in question belongs no fee shall be charged for children over three and under fifteen years of age. There are certain exceptions provided for by the statute, but for the purposes of this case any consideration of them may be excluded. The fees there mentioned are clearly the weekly fees which under s. 17 of the Act of 1870 were to be paid by every child attending a school provided by a school board. It is contended that a contribution towards the expenses of the school such as is required by the defendants in this case is not a fee within the meaning of the

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Elementary Education Act of 1891. I cannot accept this contention, for I can see no material distinction between the two forms of payment, each of which is a contribution towards the expenses of the school. Moreover, if the contention were well founded, the obvious intention of the Legislature that education in public elementary schools should as a general rule be gratuitous might be defeated. I can draw no intelligible distinction between the "parents" in this case and any other parent in the ordinary sense. If the defendants are right they could, with the support of the Board of Education, require any parent whom they might regard as of sufficient means to make such a contribution as they require in the present case.

The result, in my opinion, of the statutory provisions so far mentioned is that the defendants are not entitled to exact as a condition of the attendance of a child at one of their schools the payment of money in any form whatever, unless the case is within one of the exceptions to the prohibition contained in s. 2 of the Act of 1891. But the matter does not rest there, for by the joint effect of the statutes and of the by-laws made under them by the defendants the parent of every child of not less than five nor more than fourteen years of age is required under penalties to cause such child to attend school unless there is a reasonable excuse for non-attendance. This seems to me to imply a corresponding obligation on the part of the local education authority to permit the attendance of the child subject only to the conditions expressed or implied in the statutes, which in my opinion, as I have already said, do not include the payment of money.

I think the plaintiffs are entitled to a declaration in the terms suggested by Swinfen Eady L.J. The plaintiffs would in strictness be entitled to an injunction enforcing their right, but probably as between two public bodies the declaration would be sufficient. The result is that in my opinion the appeal should be allowed, the judgment of Neville J. discharged, and an order made such as I have indicated above.

SCRUTTON L.J. The guardians of the Gateshead Union appeal against a decision of Neville J. refusing them the relief they sought against the Durham County Council as the education authority for

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a considerable portion of the county of Durham. The Gateshead guardians have boarded out some 200 children from their union in cottages at Medomsley, which is within the educational area of the Durham County Council. Some of these children came originally from parts of the poor law union which are within the council's educational area; others came from parts of the union which are in the area of other educational authorities. These children attended the council's school at Medomsley, in which no fees are charged. After a time the council proposed to refuse these children admittance to the school unless the guardians agreed to pay in respect of all the children a contribution to the cost of maintaining the school, 1*l.* per annum per scholar attending being suggested as a suitable amount. The guardians refused to pay, and brought this action for an injunction to restrain the council from excluding the union children unless a payment was made by the guardians. The council replied that, while under art. 53 of the Education Code they could not refuse a child admission to a public elementary school except on reasonable grounds, the Board of Education were of opinion that the union children would be excluded on reasonable grounds if the ground of their exclusion was that the guardians made no contribution to the expenses of the school. The council further contended that under art. 26 of the Code the decision of the Board of Education was final and the Courts could not interfere.

The guardians, the superintendent of the cottages, and the women in charge of the cottages, called "foster-mothers," one or other of them, were clearly "parents" within the definition clause of the Act of 1870. The union children were admittedly resident in the educational district of the Durham County Council; and the school at Medomsley was admittedly a public elementary school, not receiving a fee grant before January 1, 1891. Sect. 2 of the Elementary Education Act, 1891, under these circumstances prohibited any fees being charged for the union children in that school unless under s. 4 of the same Act the Education Department had sanctioned such fees. It was admitted they had not done so; and as, if fees were sanctioned, the guardians paying them would be entitled under s. 24, sub-s. 2 (*b*), of the Local Government Act, 1888, to recover them from the county council, this sanction would, in the final result, be of no use to the council. But it was said that though the

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council might not charge fees they might claim from the parents a contribution to the expenses of the school and exclude the children if it was not paid, the only safeguard of the parents being that the Board of Education might refuse a grant to the school if they thought the exclusion unreasonable, and that this financial pressure would affect the decision of the council.

No express statutory provision was cited to us justifying such a claim for money contribution ; but s. 2 of the Elementary Education Act, 1900, allowed, though it did not compel, guardians to contribute to the expenses of a school at which their children attended, and there were two express enactments that educational authorities were not bound to provide suitable education for union children who were (1.) blind or deaf (56 & 57 Vict. c. 42, s. 2), or (2.) defective or epileptic (62 & 63 Vict. c. 32, s. 9). In the absence of such a provision I can see no ground for holding that local education authorities, who may not charge fees for the education of children, may nevertheless refuse to receive them, because of their previous residence or of the financial position of their statutory parents, unless these parents make a contribution to the expenses of the school. Such a power would enable the local education authority to demand a contribution from the parent of a large family, or from a parent who had just moved into the district from another district, or from a parent of means, who the authority thought should pay for his children's education ; and the existence of such a power would make free education a meaningless term. Yet I understood Mr. Lawrence, for the council, to contend that the authority in all these respects had such a power subject to the control exercised by the Board of Education through its power to refuse the annual grant.

The contention was put in another way. It was said that the scheme of the Education Acts did not contemplate that the " parent " had any right he could enforce, but left the duties of the education authority to be enforced by the Board of Education alone.

Under the Education by-laws the parent is compelled to send his child to school unless there is some reasonable excuse. He has also the benefit of having his children educated free. The local education authority, under s. 5 of the Education Act of 1870, which, though repealed, is continued in effect by s. 5 of the Education Act of 1902,

is bound to provide accommodation in public elementary schools available for all children resident in the district. Under par. 5 of Sched. III. of the Act of 1902 the local education authority has the duty of providing a sufficient amount of public school accommodation without payment of fees. When there is this obligation to provide free education, which is for the pecuniary benefit of the parent, who is bound to avail himself of it unless he shows reasonable excuse, it would be curious if the parent had no enforceable right to obtain this benefit. Under s. 7 of the Act of 1870 it is provided that no condition of religious observance shall be imposed on attendance at school. I asked Mr. Lawrence whether if it was attempted to impose such a condition the parent could obtain an injunction restraining such an attempt. Mr. Lawrence agreed that the parent could obtain such an injunction. Again, by the Act of 1891 no fee may be charged for children attending school. I asked whether if it was attempted to impose a fee the parent could obtain an injunction restraining the imposition. Again it was admitted that he could. I am of opinion that the parent has an equal right to restrain, by the order of the Court, an attempt to impose a condition on the admission of his child for which there is no statutory authority and which is inconsistent with his statutory right to free education.

Neville J. has, if I understand his judgment, taken the view that he cannot imply a right in the parent and correlative duty in the education authority because the Acts expressly state the duty and there can be no implication. But it seems to me that a statutory obligation to provide education without fee and without religious restriction, if broken, gives a right of action to any person specially injured by the breach of such an obligation though he is not expressly mentioned in the statute. A parent is a person specially injured by any unauthorized exclusion of his child from the free education to which he is entitled, and therefore a person entitled to sue for such a breach of statutory obligation. By similar reasoning in *Ching* v. *Surrey County Council* (1) the county council, who are bound by statute to maintain the school, are held liable in damages to a child injured by defective condition of the school which they have failed to maintain.

(1) [1910] 1 K. B. 736.

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Though Neville J. at the beginning of his judgment takes the view that the question whether the jurisdiction of the Court is ousted by the statutory provisions which make the matter determinable by the Board of Education does not really arise, it appears to me that at the end of his judgment he does decide that the obligation to give education is one the fulfilment of which is only to be determined by the Board of Education. I am unable to follow this. It may be that whether the school has earned a grant or forfeited it by non-compliance with the provisions of the Code is to be finally determined by the Board of Education; but it does not follow that a parent who has not received the benefit conferred on him by a statutory obligation cannot complain of the breach of statute in the Courts of law. We were pressed with arguments that many matters of exclusion were matters of school discipline, as dress and cleanliness, or of organization of the district of the local education authority, as the allotment of children to particular schools, and that, though there was no statutory authority for these rules, it could not be supposed that parents had a legal right to complain of exclusion on such grounds. I do not profess to decide the innumerable points of this sort which may arise. This judgment, in my view, is confined to one question: Where there is a public elementary school which does not charge fees and with vacant school places, can the local education authority exclude children resident in the district from those places unless the parent pays a contribution to the school expenses? In my opinion the authority cannot exclude on such a ground, even though the Board of Education think that the ground of such exclusion was reasonable; and the parent has a legal right to complain of such exclusion. If this power is desired by the education authority it must be obtained by fresh legislation; it is not to be found in the existing statutes.

In my opinion the appeal should be allowed with costs, with the relief as framed by Swinfen Eady L.J.

Appeal allowed.

Solicitors: *Maples, Teesdale & Co., for Lambert & Lambert, Gateshead; Sharpe, Pritchard & Co., for H. Jevons, Durham.*

W. I. C.

In re FR. MEYERS SOHN, LIMITED.

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[1917 F. 678.]

War—Trading with the Enemy—Company—Business directed to be wound up—Controller—Power to distribute Surplus Assets—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 3.

Where, under the Trading with the Enemy Amendment Act, 1916, the Board of Trade orders the winding up of a company's business and appoints a controller, and the company is not in liquidation, the controller cannot be empowered by the Board to distribute assets in his hands, so far as they are not required for payment of the debts of the business and the costs of winding up, among the shareholders of the company.

Decision of Younger J. [1917] 2 Ch. 201 affirmed.

APPEAL from a decision of Younger J. (1)

By an order of the Board of Trade, dated March 2, 1916, the business carried on by the above-named company in the United Kingdom was ordered to be wound up, and Mr. Alfred Page was appointed controller to control and supervise the carrying out of the order and to conduct the winding up of the business. Amongst the powers conferred upon the controller by that order was a power to settle a list of contributories and to make calls and adjust the rights of contributories among themselves. The company at the date of the order had a share capital of 60,000*l.* divided into 5000 preference and 55,000 ordinary shares of 1*l.* each. The company's business was that of sugar brokers and dealers and agents for sugar refineries. It was formed to acquire a business which had previously been carried on at 26, Mincing Lane, in the City, under the style of Fr. Meyers Sohn, and it continued that business. The company had only one business, namely, that carried on in the city of London. Its assets were partly in England and partly in Germany, and the liabilities were partly to creditors in England and partly to creditors in Germany; but the German assets and liabilities were all in connection with the company's English business. All the British assets of the business had been realized. After payment of all creditors except those in Germany these assets amounted to about

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26,000*l.* The German assets of the business not in the hands of the controller amounted to about the same sum. All the preference shares were held by Dr. Meyer, a German, resident in Germany; a large number of the ordinary shares was also held in Germany. A large sum would ultimately be available in respect of surplus assets. In these circumstances a summons was taken out by the controller for the determination of the question whether, the company not being in liquidation, the assets in his hands, so far as they were not required for payment of the debts of the business and the costs of the winding up, were divisible among the shareholders at all, or must be held for and on account of the company or its assigns.

Younger J. held that under the concluding words of s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916, the Board of Trade had no power to direct distribution of the surplus assets among the shareholders of the company.

The controller appealed.

Gore-Browne, K.C., and *Wilfrid Hunt*, for the appellant. It is submitted that the Board of Trade may, under s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916, authorize the controller to distribute the surplus assets of the business among the shareholders of the company notwithstanding that the company is not in liquidation.

[SWINFEN EADY L.J. You are proposing that the controller should do something which in an ordinary case could only be done in a winding up.

WARRINGTON L.J. All that the controller is appointed to do is to wind up the business of the company.]

The question is what is the real meaning of s. 1, sub-s. 3.

[SWINFEN EADY L.J. Why is there not a winding up?]

The controller desires to take advantage of sub-s. 4 of s. 1, which provides that "Where there are assets of the business in enemy territory, the controller shall cause an estimate to be prepared of the value of those assets and also of the liabilities of the business to creditors, whether secured or unsecured, in enemy territory, and of the claims of persons in enemy territory to participate in the distribution of any balance available for distribution, and such liabilities and claims shall, for the purposes of this section, be deemed

to have been satisfied out of such assets so far as they are capable of bearing them, and the balance (if any), of such liabilities and claims shall alone rank for payment out of the other assets of the business. . . . ." If the controller is not entitled to deal with the claims of shareholders the benefit of sub-s. 4 may be lost. Sub-s. 2 enables the Board of Trade to confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company.

Sir Gordon Hewart, S.-G., and *Austen-Cartmell*, for the Board of Trade. The meaning of the Act of 1916 must be ascertained from the words used in it. The Act arbitrarily draws a line between assets in this country and assets in an enemy country. Where a company is concerned it is submitted that the phrase " order for the winding up of the business of " the company may well mean the winding up of the company. It is said, however, that there is a difference between the winding up of a company and the winding up of the business of the company. But under s. 1, sub-s. 2, the Board of Trade may confer on the controller " such powers as are exercisable by a liquidator in a voluntary winding up of a company." As to what those powers are, see Companies (Consolidation) Act, 1908, s. 186, clauses (iv.) and (v.), and s. 151. The effect, therefore, of an order under s. 1, sub-s. 2, is to enable the controller to wind up the company. It is submitted, therefore, that in a proper case the Board of Trade may direct the controller to distribute the surplus assets of the company amongst the shareholders of a company notwithstanding that the company is not in liquidation.

Swinfen Eady L.J. The question raised by this appeal is whether Younger J. was right in holding that where, under the Trading with the Enemy Amendment Act, 1916, the Board of Trade orders the winding up of a company's business and appoints a controller, but the company is not in liquidation, the controller cannot be empowered by the Board to distribute the assets in his hands, so far as they are not required for payment of the debts of the business and the costs of the winding up, among the shareholders of the company.

In substance the argument addressed to us is that the judge below took too narrow a view of the Act. and that if full effect is

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given to the language of s. 1 of the Act it in fact empowers the controller to wind up the company. The Solicitor-General did not stop short of that contention; and his argument as presented could not have stopped short of that, because it would have been meaningless if it had. The argument was that although the company is not in liquidation—that is to say, although there has been no resolution passed to wind up the company and no order to wind it up—yet the effect of the language of s. 1, sub-s. 2, is that the Board of Trade can proceed to authorize the controller to act in every way as if there were a winding up and with all the powers that a liquidator has in a winding up, so that they can confer on him a right to make calls and distribute assets, and generally to deal with the matter upon the footing that there is a winding up. It must follow, if that argument be well founded, that the contributories and all parties interested are to be treated as if there were a valid winding up of the company in question, and their rights governed by that position.

In my judgment the language of the Act does not support any such contention. Sect. 1, sub-s. 1, provides: "Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of the members of that firm or company or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—(*a*) prohibiting the person, firm, or company from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the order; or (*b*) requiring the business to be wound up."

That sub-section gives very extended powers to the Board of Trade. They have made an order in the present case under s. 1, sub-s. 1 (*b*), and the order requires the business to be wound up. It will be observed that the Board have not any power to order the company to be wound up; it is only a power to order "the business carried on" to be wound up. The business which is required to be wound up is not limited to the business of a company, but may also be the business of a person, or of several persons trading as a firm,

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That explains some of the later provisions of the section. They may not necessarily be applicable to every previous part of the section, but may be applicable to the case where the business to be wound up is the business of a person or of a firm, and not the business of a company. Sect. 1, sub-s. 2, says: "Where the Board of Trade make any such order they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business." The order may have been made to prohibit the person, firm, or company from carrying on the business, except subject to some specified conditions, and then the controller may "control and supervise the carrying out of the order"; but where the order has required the business to be wound up the controller may be appointed to conduct the winding up—again, not of the company, but "of the business." Then follow the words upon which so much reliance was placed by the Solicitor-General: "and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding up of a company (including power in the name of the person, firm, or company, or in his own name, and by deed or otherwise, to convey or transfer any property,"—that, of course, is a power for selling and realizing the business property in the course of winding up of the business—"and power to apply to the High Court or a judge thereof to determine any question arising in the carrying out of the order), or those powers subject to such modifications restrictions or extensions as the Board think necessary or convenient"—observe for what purpose—"for the purpose of giving full effect to the order." The order is to conduct the winding up of the business. Then the sub-section goes on to provide that the remuneration of and the costs incurred by the controller are to be payable out of the assets of the business. Sub-s. 3 deals with the distribution of the money realized. It will be observed that there is no provision for discharging the general debts, or for collecting the general assets; but the sub-section is concerned only with debts and assets of the business. Sub-s. 3 has this final proviso: "and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade

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may direct." It was suggested that those words would have no meaning if the controller had merely to hand over the surplus proceeds to the company instead of distributing them amongst the beneficiaries; but that is not so. Where the persons interested are individuals or a firm it may well be that the assets may be distributed and paid over to the persons entitled to them; and so where a company is in liquidation they might be lodged with the liquidator of the company.

Sub-s. 7 of the same section shows that it was contemplated that a winding up would be necessary, and that it was not intended by Parliament that the provision to which I have drawn attention should supersede a winding up and render it unnecessary. It expressly provides for the cases both of a voluntary winding up and a compulsory winding up. It deals with the case of a company in respect of which an order has been made under the section, and provides that no proceedings may be taken and no resolution passed for the winding up of the company "without the consent of the Board of Trade." In the present case it is conceded that there are directors and shareholders in this country and that a general meeting could be held; and, if the Board of Trade consented, there is apparently no reason why there should not be a voluntary winding up. Again, sub-s. 7 provides: "but the Board of Trade may present a petition for the winding up of the company by the Court, and the making of an order under this section shall be a ground on which the company may be wound up by the Court." So that the statute has added a new ground upon which a limited company may be wound up by the Court; and where an order has been made under s. 1 of that Act the Board of Trade have upon that, and upon that alone, a statutory right to present a petition to the Court for a compulsory order.

I think these provisions make it quite clear that it was not intended that an order by the Board of Trade under this Act should supersede a winding up, especially as the only power of the Board is to appoint a controller to wind up the business and the powers given to him are limited to those required for giving full effect to the order to wind up the business.

For these reasons I am of opinion that the arguments on the appeal are not well founded and that the company is not in volun-

tary winding up. To hold otherwise would be to render the provisions of the statute unworkable. In my judgment, therefore, the order made in the Court below was right. The company is not in winding up, and the order conferring powers on the controller does not obviate the need for a winding up, if it is desired to make a return of capital to shareholders or make a call. I am of opinion, therefore, that the appeal fails and should be dismissed.

WARRINGTON L.J. I am of the same opinion. The appeal raises the question whether a controller appointed by the Board of Trade under the Trading with the Enemy Amendment Act, 1916, can, with the sanction of the Board of Trade, distribute the balance of the assets collected by him and remaining in his hands after paying liabilities in this country amongst the shareholders of the company.

Payment of capital assets to the shareholders of a company by way of a return of their capital can only be effected in a winding up, or under the provisions of the Companies (Consolidation) Act, 1908 for the reduction of capital; and the question here really resolves itself into a question whether the order of the Board of Trade under the Act of 1916 is in substance an order for the winding up of the company. In my opinion, it is not. It is only necessary to look at the Act to answer that question. The Act begins in s. 1, sub-s. 1, with these words: "Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company" satisfies certain conditions, the Board of Trade may make an order "(*b*) requiring the business to be wound up." I think it is quite obvious that when the Act refers to the business which is to be wound up it means the business of the person, firm, or company carried on in the United Kingdom. When, therefore, a controller is appointed under sub-s. 2 he has no power to wind up any business which may be carried on out of the United Kingdom, or to get in assets or pay debts there. In fact he is only directed to pay the debts of the company in the United Kingdom. It seems to me quite plain that the winding up of the business of a company in the United Kingdom is not the same thing as the winding up of the company. The winding up of a company is a statutory

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expression, and when it takes place it involves certain legal consequences arising from the provisions with regard to winding up contained in the Companies (Consolidation) Act, 1908. No such provisions are contained in the Act of 1916, nor is there anything in that Act making those conditions arise if an order such as that contemplated by s. 1 of the Act is made by the Board of Trade. In my opinion, the powers of the controller, large as they may be, are limited by the purpose for which he is appointed, namely, to control and supervise the carrying out of the order of the Board of Trade requiring the business to be wound up.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors: *Reynolds & Miles; Solicitor to the Board of Trade.*

W. I. C.

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In re SUAREZ.

SUAREZ *v.* SUAREZ.

[1914 S. 278.]

International Law—Ambassador—Privilege—Waiver—Administration Action—Submission to Jurisdiction—Order for Payment into Court—Service—Writ of Sequestration—Leave to issue—Removal from Diplomatic List—Evidence—Rules of Supreme Court, 1883, *Order* XLII., *rr.* 4, 24—*Diplomatic Privileges Act*, 1708 (7 *Anne*, *c.* 12), *s.* 3.

A Minister of a foreign State in England was sued for an account as administrator to an intestate's estate, and in such proceedings waived his diplomatic privilege, instructed solicitors to accept service of the originating summons therein, and obtained an order for an account against the plaintiff in the action. Subsequently after ceasing to be such Minister he set up the Diplomatic Privileges Act, 1708, as a defence to an application against him for sequestration for non-compliance with an order for payment into Court of trust moneys:—

Held, by Swinfen Eady and Warrington L.JJ., that an Ambassador or public Minister can with the consent of his Government

effectually waive his privilege and that the Minister's immunity had ceased.

Taylor v. *Best* (1854) 14 C. B. 487 followed.

Dictum of Lord Talbot in *Barbuit's Case* (1737) Cas. t. Talb. 281 explained.

Held, by Scrutton L.J., doubting the authority of *Taylor* v. *Best*, that the Minister was estopped by his conduct from alleging the invalidity of the proceedings in the action.

A letter from the Foreign Office under the hand of an Assistant Secretary of State stating that a foreign Minister's name has been removed from the Diplomatic List is sufficient evidence that the Minister has ceased to hold diplomatic office at the date of the letter.

Under Order XLII., rr. 4 and 24, the Court has power to direct a sequestration to issue for non-compliance with an order for payment of money into Court notwithstanding that the order directing payment within a fixed time has not been served on the defendant pursuant to Order XLIII., r. 6, if the Court is satisfied that the defendant knew of the order and is evading service of it.

Decision of Eve J. affirmed.

APPEAL from a decision of Eve J.

The facts, which are taken substantially from the written judgment of Swinfen Eady L.J., were as follows:

Francisco Suarez died intestate on February 10, 1897, possessed of considerable property. Whether he was domiciled here was a matter in dispute, an inquiry as to domicil not having yet been answered. On February 23, 1900, letters of administration to his estate were granted to defendant Pedro Suarez as the attorney of and for the use and benefit of the plaintiff, Nicholas Suarez. The plaintiff and the defendant each claimed to be one of the next of kin of Francisco, and as such entitled to a share of his personal estate. The defendant Pedro Suarez, in and prior to January, 1914, was the duly accredited Minister for the Republic of Bolivia in England, and so continued until some time shortly prior to September 21, 1917.

In January, 1914, the plaintiff was desirous of having the estate administered by the Court and ascertaining definitely of what it consisted, and who were the parties entitled to a share of it, and it would appear that the defendant then also took the view that such a course was desirable. Accordingly, on January 26, 1914, the plaintiff issued an originating summons asking for an account

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and that the personal estate might be administered by the Court. A copy of this summons was sent to the defendant's solicitors on the same day, and in answer they wrote as follows:—

"28th January, 1914.

"Dear Sirs,

"Re Francisco Suarez, deceased.

"We have yours of the 26th inst. enclosing copy of originating summons issued by you in this matter. Our client Colonel Suarez is perfectly willing to have the estate administered by the Court; in fact he was considering taking the same step himself, and if you will let us have the originating summons we will endorse thereon our acceptance of service.

"Yours truly,

"Hyland, Atkins & Roger."

Accordingly the original summons was sent to them, and they wrote upon it the following memorandum:—

"We accept service of this summons on behalf of Pedro Suarez, and undertake to enter an appearance thereto in due course.

"Dated 29th January, 1914.

"Hyland, Atkins & Roger.

"81, Cannon Street, E.C."

In due course they entered an appearance.

The originating summons came on for hearing before Joyce J. on July 10, 1914, when Mr. Tomlin, K.C., appeared for the defendant Pedro Suarez. The hearing of the summons was adjourned until July 14, 1914, at the desire of the defendant's counsel, to enable him to take the personal instructions of the defendant as to claiming privilege as Minister for the Republic of Bolivia.

On July 14, 1914, Mr. Tomlin, K.C., stated to the Court that defendant Pedro Suarez waived his privilege, and the order for administration was accordingly made on that date. The judge added as co-defendant one Hugo Boger, directed the usual accounts and inquiries, and gave the conduct of the accounts and inquiries thereby directed to the new defendant, Hugo Boger. The plaintiff appealed from this order so far as it gave the conduct to Boger, and the defendant Pedro Suarez gave notice to the plaintiff and

the defendant Boger, pursuant to Order LVIII., r. 6, of the Rules of the Supreme Court, of his intention to contend that the order of Joyce J. should be varied by the insertion therein of a direction that an account be taken of the personal estate of Francisco Suarez, deceased, come to the hands of the plaintiff as agent for the defendant Pedro Suarez, the administrator of the said Francisco Suarez, or otherwise, or the hands of any other person or persons by the order or for the use of the plaintiff as such agent or otherwise, and of a submission by the plaintiff to account as aforesaid; or, in the alternative, in the event of the plaintiff refusing to submit to account, that this action might be dismissed with costs.

The appeal and cross-contention were disposed of on July 30, 1914, when the order of Joyce J. was varied and effect given to the contentions of each party—Boger was to be at liberty to attend in chambers upon the taking of the accounts and inquiries, but did not have the conduct of them, and, the plaintiff, by his counsel, submitting to account, an additional account was directed, namely, an account of the personal estate of the intestate come to the hands of the plaintiff as the attorney of the defendant Pedro Suarez or to the hands of any other person or persons by the order or for the use of the plaintiff. It appeared that the defendant, after obtaining letters of administration, had appointed the plaintiff his attorney to collect moneys due to the estate abroad.

The position, therefore, was that the defendant had appeared voluntarily without the summons having been served upon him, that he expressly waived any diplomatic privilege on the hearing of the summons, and that he came in under the proceedings and took the benefit of them, and himself claimed and obtained an order for the plaintiff to account.

In January, 1915, questions arose whether the defendant Pedro should waive his privilege in respect of another proceeding, and on January 29, 1915, his solicitors wrote to plaintiff's solicitors that the defendant was prepared to write to the President of Bolivia and ask him whether in such other proceeding the President would consent to waiver of privilege. This letter, which in terms referred to the fact that the President had authorized the defendant to

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waive his privilege in the administration action, was (so far as material) as follows:—

"81, Cannon Street, E.C., 29 January, 1915.

"Messrs. Darley, Cumberland & Co.

"Dear Sirs,

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"Your client is misinformed. The President of Bolivia authorized Colonel Suarez to waive the privilege in the case of the administration of Francisco Suarez' estate, but he has not done so in any other matter. Colonel Suarez informs us that the view of the Diplomatic Corps is that they cannot themselves waive the privilege, which attaches to their respective countries, the consent of whose ruler they must obtain, and we believe this is the correct view under International law.

. . . . . .

"Yours truly,

"Hyland, Atkins & Roger."

The accounts were taken under the administration order; the defendant filed accounts, made affidavits, and was cross-examined upon them. The result was that large sums appeared to be due from him. By a subsequent order dated July 3, 1916, an inquiry as to domicil was added. The defendant lodged one sum of 3698*l.* in Court, in pursuance of an order against him to that effect, and he also voluntarily lodged 19,500*l.* Consols in Court. A surcharge was brought in against him and proceeded upon, and, on the conclusion of his cross-examination before Eve J., he submitted to be surcharged on his accounts as administrator with the sum of 16,269*l.* 4*s.* 9*d.*; and by an order made by Eve J. on January 30, 1917, the defendant was ordered to pay that sum into Court, with a provision that no steps were to be taken to enforce the order if the amount was paid into Court by the instalments therein mentioned, the first of which was payable on or before February 21, 1917, and the last of which was payable on or before July 20, 1917. No part of this amount had been paid into Court by the defendant, although he was personally present in Court when the order was made.

On March 5, 1917, the defendant was personally served with an order to attend before the Master on March 9, 1917, for examina-

tion as to his means. On March 7, 1917 (the defendant being then in default in respect of the first instalment), an order was made for the defendant to pay into Court the 16,269*l.* 4*s.* 9*d.* on or before March 14, 1917. The next day, March 8, 1917, he left this country, and there was no evidence that he had since returned, and he had not made any further payment into Court. On the same March 8 the defendant's solicitors forwarded to the plaintiff's solicitors a copy of a letter they had received from their client in the following terms:—

"81, Cannon Street, E.C., 7 March, 1917.

"Messrs. Nelson, Son & Plews, 31, Budge Row, E.C.

"Dear Sirs,—As you are aware, during the last three years I have been trying to obtain evidence from Bolivia in regard to the cases, and that [*sic*] all the documents that have been sent to me have gone astray. In view of this, I have requested the Bolivian Government to grant me leave to go personally and obtain all the documents and particulars I require. This leave has been granted me, allowing me three months commencing from the 1st inst., and as the time is so very short, and as it is necessary to avail myself of the first steamer going out, I am unable to attend the Court on Friday the 9th inst. I should therefore be greatly obliged to you if you would express my regrets to the Master, assuring him that it is quite unavoidable. As time at my disposal is so very short, I shall not be able, as I had intended, to make out a written statement in regard to my financial standing, but I will endeavour to send it to you from Bolivia.

"Yours faithfully,

"Pedro Suarez."

The three months' leave mentioned in this letter would expire on June 1. There was no evidence that this leave was ever extended.

On March 10, 1917, a summons was issued by the plaintiff under the Courts (Emergency Powers) Acts, 1914—1916, for leave to proceed to execution, or otherwise for the enforcement of payment of the sum of 16,269*l.* 4*s.* 9*d.* so directed to be paid into Court by the defendant Pedro Suarez, and that the plaintiff might be at liberty to issue a writ of sequestration against the property and effects of the defendant.

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On March 26, 1917, the summons came on to be heard before Eve J., and the defendant then asserted his immunity from process by way of execution and set up the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), as an answer to the application. In these circumstances Eve J., in a considered judgment delivered on May 23, after discussing the authorities, declined to make any order on the summons except that it should stand over generally with liberty to restore in the event of the defendant ceasing to hold an office to which the immunity he asserted attached. The case is reported in [1917] 2 Ch. 131.

On September 21, 1917, Sir Walter Langley, the Assistant Under-Secretary at the Foreign Office, wrote to the plaintiff's solicitors that he was directed by Mr. Secretary Balfour to inform them that His Majesty's Chargé d'Affaires at La Paz had then ascertained and reported by telegraph that the Bolivian Government had terminated the appointment of Colonel Suarez as Bolivian Minister at the Court of St. James's, and that his name had accordingly been removed from the Diplomatic List.

On October 23, 1917, the summons was restored and the plaintiff renewed his application before Eve J. His Lordship thereupon granted the plaintiff's application, and in the course of his judgment said that, although the diplomatic privilege did not cease for a reasonable time after the diplomatic mission was determined, this was not a case in which, in his opinion, the defendant ought to have any further time granted to him. He had departed secretly from this country after an order for payment had been made against him, and was a fugitive from justice. He deliberately remained outside the jurisdiction, and had done nothing to meet the order. There was not a shred of evidence to show that the granting of the order would interfere with the defendant's service to his country. The learned judge also rejected the defendant's contention that the proceedings in the action were wholly void, and held that he had power to direct a sequestration to issue notwithstanding that the order directing payment into Court within a fixed time had not actually been served on the defendant.

The defendant appealed, and the appeal was heard on November 19, 20, 1917.

Hon. Frank Russell, K.C., and *H. F. F. Greenland*, for the appellant. 1. We contend that Eve J. had no jurisdiction to direct a sequestration to issue, because the whole proceedings are null and void by virtue of the Diplomatic Privileges Act, 1708, s. 3. (1) This section totally prohibits the issue of all writs and processes whatsoever against Ambassadors or foreign Ministers. The section is not confined to writs of execution: *Magdalena Steam Navigation Co.* v. *Martin.* (2) Moreover, s. 4 of the statute (1) imposes pains and penalties on persons issuing such processes, and it is settled law that where a statute not only declares an act void but also imposes a penalty on persons doing such acts the word "void" cannot be construed as voidable: *Gye* v. *Felton.* (3) The Court had therefore no jurisdiction at all to entertain the action: *Musurus Bey* v. *Gadban* (4); *Magdalena Steam Navigation Co.* v. *Martin.* (5)

2. The waiver by the appellant of his diplomatic privilege was wholly ineffectual. The proceedings were null and void throughout, and a nullity cannot be waived: *Barbuit's Case.* (6) Consent of parties cannot give the Court a jurisdiction which it does not possess: *Foster* v. *Usherwood* (7); *In re Aylmer.* (8)

(1) By the Diplomatic Privileges Act, 1708, it is provided, s. 3: "And to prevent the like insolences for the future be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by her Majesty her heirs or successors or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever."

By s. 4 it is provided "And . . . . in case any person or persons shall presume to sue forth or prosecute any such writ or process such person and persons and all attorneys and sollicitors prosecuting and solliciting in such case and all officers executing such writ or process being thereof convicted . . . . shall be deemed violators of the laws of nations and disturbers of the public repose and shall suffer such pains penalties and corporal punishment as the said lord chancellor lord keeper and the said chief justices or any two of them shall judge fit to be imposed and inflicted."

(2) (1859) 2 E. & E. 94.
(3) (1813) 4 Taunt. 876.
(4) [1894] 2 Q. B. 352, 361.
(5) 2 E. & E. 112.
(6) Cas. t. Talb. 281.
(7) (1877) 3 Ex. D. 1, 3.
(8) (1887) 20 Q. B. D. 258, 262.

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[SWINFEN EADY L.J. Has *Taylor* v. *Best* (1) ever been overruled ?]

That case is no doubt to the contrary effect, but it was a very special case : *In re Republic of Bolivia Exploration Syndicate.* (2) It is the only case in the books in which a waiver has been held good. The judgment in *Taylor* v. *Best* (1) was based on the opinions of the jurists as to the law of nations and must be read in the light of the decisions prior to its date. Moreover, in that case the Ambassador was only one of several defendants against whom a joint cause of action had arisen. Both Jervis C.J. and Maule J. emphasize the injustice which would have been done in that case to the other defendants if the action had been stayed against the privileged defendant. (3) The *Magdalena Case* (4) shows that a writ cannot be issued against an Ambassador at all. After that decision there is not much left of *Taylor* v. *Best* (1) : *In re Suarez.* (5)

[SWINFEN EADY L.J. It looks from the passage at p. 111 of the *Magdalena Case* (4) as if Lord Campbell C.J. thought that the privilege could be waived.]

That suggestion has been explained by Astbury J. as referring to the passage in Coke (6) dealing with forfeiture by crime : *In re Republic of Bolivia Exploration Syndicate.* (7)

[WARRINGTON L.J. Lord Campbell's view appears to have been that s. 3 of the statute of Anne was merely a statement of the law of nations.]

The position under the law of nations was necessarily modified in England after the passing of a statute which not only declared the proceedings to be null and void, but also imposed penalties for their inception.

[SWINFEN EADY L.J. referred to *Mighell* v. *Sultan of Johore* (8) as showing that a foreign Sovereign can submit to the jurisdiction.]

The case of a foreign Sovereign is different from the case of an Ambassador. There is no statutory prohibition of process against a foreign Sovereign. We submit that *Taylor* v. *Best* (1) was wrongly

(1) 14 C. B. 487.
(2) [1914] 1 Ch. 139, 156.
(3) 14 C. B. 520, 521, 523.
(4) 2 E. & E. 94.
(5) [1917] 2 Ch. 131, 137.
(6) 4 Co. Inst. 153.
(7) [1914] 1 Ch. 139, 149.
(8) [1894] 1 Q. B. 149, 159.

decided, and that even with his Sovereign's consent an Ambassador cannot waive his privilege under the statute.

[SWINFEN EADY L.J. referred to *Marshall* v. *Critico.* (1)]

There is nothing in that case to show that the whole of the res gestae did not happen after the Minister in question ceased to hold office.

[SWINFEN EADY L.J. Lord Ellenborough in that case pointed out that the privilege was that of the Sovereign, not of the Minister.

SCRUTTON L.J. referred to *The Parlement Belge.* (2)]

We rely on the dicta of Davey L.J. in *Musurus Bey* v. *Gadban* (3) to show that the true view is that there is no jurisdiction or cause of action at all. The Sovereign can waive his own privilege, but he cannot waive his Ambassador's privilege in contravention of the statute. If the parties submit to the jurisdiction of a Court which in fact has no jurisdiction the Court is merely in the position of an arbitrator.

3. If waiver is possible at all it must be with the consent of the Sovereign: *United States* v. *Benner.* (4) But there is no evidence in the present case that the Sovereign's consent to waiver was actually obtained.

[SWINFEN EADY L.J. Must we not assume that what the Minister did was done with his Sovereign's permission?]

The Court cannot in punitive proceedings for contempt act on inference.

4. Assuming that there was an effective waiver of privilege, it was only a waiver to the extent of enabling Joyce J. to make an order for accounts and inquiries, and the waiver did not extend to proceedings for enforcing any resulting liability. *Taylor* v. *Best* (5) shows that there must be no coercion of a foreign Minister, but suggests that a case might be prosecuted up to judgment only. The Court cannot make an order to enforce process unless it is shown that the defendant has waived his privilege with knowledge for the purpose of the particular process.

5. The letter from the Foreign Office is not sufficient evidence

(1) (1808) 9 East, 447.
(2) (1880) 5 P. D. 197, 207, 208.
(3) [1894] 2 Q. B. 352, 361, 362.
(4) (1830) 1 Baldwin, 240.
(5) 14 C. B. 487, 521, 522.

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that the defendant has ceased in fact to be a public Minister. It is based on mere hearsay.

[SWINFEN EADY L.J. The statement in the letter that the defendant's name has been removed from the Diplomatic List is important on this point: *Mighell* v. *Sultan of Johore.* (1)

SCRUTTON L.J. referred to *Foster* v. *Globe Venture Syndicate.* (2)]

6. If the Foreign Office letter is sufficient evidence that the defendant has ceased to be a foreign Minister it contains no evidence of the date when he so ceased. The Court cannot infer that he ceased to be a Minister at any date earlier than September 21, 1917, the actual date of the letter. The privilege of an Ambassador continues for a reasonable time after he ceases to hold office: *Magdalena Steam Navigation Co.* v. *Martin* (3); *Musurus Bey* v. *Gadban.* (4) In the present case barely a month had expired since the date of the letter before Eve J. made the order under appeal. A month is not a reasonable time within the decisions.

7. The last point is a purely technical one. A writ of sequestration to enforce compliance with an order for payment of money into Court issues under Order XLIII., r. 6. This rule imposes two conditions—first, that the order to be enforced must specify a time for the performance thereof, and, secondly, that the order must be duly served on the person ordered to make the payment. The order of January 30, 1917, did not fix any time for the payment into Court, and the order of March 7, 1917, which limited a time, was admittedly never served on the defendant, nor is there any evidence that it came to his knowledge. There has therefore been no contempt shown of either order. Sequestration is clearly a process of contempt: *Pratt* v. *Inman* (5); and the Court cannot in cases of contempt infer that the second order ever came to the knowledge of the defendant. It must be proved that the defendant is in contempt, and this has not been done.

Maugham, K.C., and *Meyrick Beebee*, for *Cyril Hartree* (serving with His Majesty's Forces), for the respondents. There are many cases in the books in which the Court has construed the word "void" in Acts of Parliament as voidable. Thus in *Gowan* v.

(1) [1894] 1 Q. B. 149.
(2) [1900] 1 Ch. 811.
(3) 2 E. & E. 94.
(4) [1894] 2 Q. B. 352.
(5) (1889) 43 Ch. D. 175, 179.

Wright (1) it was held that the non-compliance with the requirements of s. 27 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), that a judge's order for judgment made by consent of the defendant in a personal action shall be filed within twenty-one days after the making thereof, "otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void," only rendered such an order and judgment void as against the creditors of such defendant, and not as against himself; see also Maxwell on the Interpretation of Statutes, 4th ed. pp. 317-318. In *Gye* v. *Felton* (2) the statute there considered only dealt with the rights of infant apprentices who could not protect themselves: see also *Rex* v. *Inhabitants of Hipswell.* (3)

As to the contention that the proceedings are void under the statute of Anne, there is overwhelming authority that s. 3 of the Act is merely declaratory of the then existing law of nations: *Triquet* v. *Bath* (4); *Heathfield* v. *Chilton* (5); *Viveash* v. *Becker* (6); *Novello* v. *Toogood.* (7)

[SCRUTTON L.J. referred to *Parkinson* v. *Potter* (8) as explaining the decision in *Novello* v. *Toogood.* (7)]

If the section was declaratory of the existing law, then it cannot have been intended to place an Ambassador in a better position than a King. The Court must look at the statute, and the circumstances under which it was passed, to see whether s. 3 is germane to the matter in question. The section was, it is submitted, intended to be declaratory of the common law with regard to proceedings in invitum: *Taylor* v. *Best* (9); *Magdalena Steam Navigation Co.* v. *Martin* (10); *The Parlement Belge.* (11) Being, therefore, merely declaratory of the common law, the ambit and scope of the statute must be ascertained. Its scope was not, it is submitted, to take away the right of an Ambassador to assent to the jurisdiction, but to deal with proceedings in invitum. Its ambit was confined to something in the nature of insolence or something

(1) (1886) 18 Q. B. D. 201.
(2) 4 Taunt. 877, 880.
(3) (1828) 8 B. & C. 466.
(4) (1764) 3 Burr. 1478.
(5) (1767) 4 Burr. 2016.
(6) (1814) 3 M. & S. 284.
(7) (1823) 1 B. & C. 554.
(8) (1885) 16 Q. B. D. 152.
(9) 14 C. B. 487.
(10) 2 E. & E. 94.
(11) 5 P. D. 197.

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done in invitum. It was not intended, for example, that a solicitor who received instructions to act for an Ambassador should be liable to pains and penalties under s. 4 of the Act. Sect. 3 does not extend to a case where an Ambassador assents to or invites the jurisdiction of the Court. There was no insolence here when the defendant entered an appearance to the summons. Non constat that there was anything in invitum when the originating summons was issued.

Taylor v. *Best* (1) has definitely decided that a writ sued out against a Minister is not per se void, and that if he consents to the proceedings they may continue. That case is of high authority and has never been overruled, and should be followed in this case. The statute of Anne does not apply where there is a voluntary assent to the jurisdiction.

As to the dictum of Campbell C.J. in *Magdalena Steam Navigation Co.* v. *Martin* (2), that "The writs and processes described in the 3rd section are not to be confined to such as directly touch the person or goods of an Ambassador, but extend to such as, in their usual consequences, would have this effect," it is to be observed that the action there was for calls, and therefore of a hostile character. An originating summons for administration issued against an Ambassador is not an action which in its nature would necessarily have the effect of touching his property or person, and is not therefore included in the writs and processes referred to in s. 3 of the statute. This is not a case in which the defendant was not interested in the subject-matter of the action. He may be entitled to a distributive share of the estate. It might be of importance to him that he should be able to appear as a defendant to the action: *Duke of Brunswick* v. *King of Hanover.* (3)

[SCRUTTON L.J. Has the case of an Ambassador engaged in trade ever come before the Courts?]

Taylor v. *Best* (1) is the only case. There Drouet was so engaged. In an administration action it is not the Minister's goods which are aimed at. That distinguishes the present case from *Magdalena Steam Navigation Co.* v. *Martin.* (2) *Barbuit's Case* (4) is relied

(1) 14 C. B. 487.
(2) 2 E. & E. 94, 114.
(3) (1844) 6 Beav. 1, 39; S. C. on appeal (1848) 2 H. L. C. 1, 25.
(4) Cas. t. Talb. 281.

on in support of the contention that waiver by a Minister of his privilege is ineffectual. But it is impossible to ascertain the desires of a Sovereign except through his accredited Minister.

Then it is said that the waiver extended only to the making of the order for accounts and inquiries. But the answer to that contention is that the waiver continues until the position of the Minister is altered by a distinct claim of privilege. In the present case it is not stated when the defendant ceased to be a Minister.

[WARRINGTON L.J. The letter of the Foreign Office is sufficient.]

As to the objection that leave to issue a writ of sequestration ought not to be granted because the order of March was not served on the defendant, Order XLIII., r. 6, enables a person to issue a writ of sequestration without obtaining any order. But the Court can order a writ of sequestration to issue under Order XLII., rr. 4 and 6. In one sense sequestration is a proceeding for contempt, but it is also a form of execution.

[WARRINGTON L.J. The reason for the rule is that you cannot issue a writ of fi. fa. to enforce payment into Court.]

Where the writ is issued by the order of the Court the conditions of Order XLIII., r. 6, do not apply. Thus a writ of sequestration to enforce payment of costs can issue notwithstanding that the order for the payment of such costs does not fix a time for payment: *In re Lumley.* (1) The report in *Knill* v. *Dumergue* (2) does not state whether the order for payment limited a time.

As to want of service, if the writ issues by order personal service of the order directing service is not necessary: *In re Deakin.* (3) The practice is to dispense with personal service of the application for the issue of a writ of sequestration where the person has disobeyed an order of the Court with full knowledge of its having been made and is keeping out of the way to avoid service: *Rex* v. *Wigand.* (4) The circumstances here were amply sufficient to enable the judge below to direct that the writ of sequestration should issue. The summons was taken out for payment within four days. Contemporaneously an order was made on February 27, 1917, for the defendant to attend before the Master to be examined as to his means. It is clear that he was aware of

(1) [1894] 2 Ch. 271.
(2) [1911] 2 Ch. 199.
(3) [1900] 2 Q. B. 478.
(4) [1913] 2 K. B. 419.

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this. He was personally served with the order. On March 5 he was at his solicitors' office, and on March 8 he left the country and has not returned. The reasonable inference is that, the order of January 13 not having been obeyed, he knew that application was being made for payment of the 16,269*l.* 4*s.* 9*d.*

The order of the judge below was right and should be affirmed.

H. F. F. Greenland in reply. The cases in which it has been held that the statute of Anne is declaratory have been cases in which it has been endeavoured to deprive persons of their privilege under the law of nations on the ground that they were not domestic servants of an Ambassador within the words of the statute. In the *Magdalena Case* (1) Lord Campbell said: "It never was intended by this statute to abridge the immunity which the law of nations gives to Ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited." *Service* v. *Castaneda* (2) shows that in the opinion of Knight Bruce V.-C. there might be persons who might rely on the statute of Anne for the privilege although they were not strictly within it. There is no authority for the proposition of the respondents that the express words of the statute are capable of being modified by the law of nations ascertained from the opinions of the jurists. *Taylor* v. *Best* (3) is not a decision on the statute at all. The statute is not referred to in the judgments except incidentally in reference to the position of domestic servants of an Ambassador. The case appears to have been argued and decided on the assumption that the statute applied only to writs of execution. This assumption has since been decided in the *Magdalena Case* (1) to be unfounded.

It is said that an administration summons is not a process within the statute of Anne. But it is a process which may lead to the payment of money. It is just as probable as in any other case that money will be ordered to be paid by the defendant.

The question of sequestration for non-payment of costs rests on an entirely different basis. Order XLIII., r. 7, is a substitute for the old practice of issuing a subpœna for costs followed by a writ of sequestration as a matter of course.

Cur. adv. vult.

(1) 2 E. & E. 94, 115. (2) (1845) 2 Coll. 56, 59.
(3) 14 C. B. 487.

1917. Dec. 5. The following written judgments were delivered :—

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SWINFEN EADY L.J. This is an appeal from an order of Eve J. made on October 23, 1917, giving leave to issue a writ of sequestration against the defendant, Pedro Suarez, for not paying into Court 16,269*l.* 4*s.* 9*d.*, a portion of trust moneys received by him, which, by an order dated January 30, 1917, he was ordered to pay into Court, and which by a supplemental order dated March 7, 1917, he was ordered to pay into Court on or before March 14, 1917.

The defendant, Pedro Suarez, contends that as a former Minister of the Republic of Bolivia he was and is exempt from civil process. The answer to which by the plaintiff is that the defendant's diplomatic position has long since ceased to exist, and that while the defendant was Minister, by the direction or with the consent of his Government, he expressly waived his diplomatic privilege, and voluntarily came in under the present proceedings and took advantage of them to obtain an order against the plaintiff to account.

The facts of the case are not in dispute. The defendant, Pedro Suarez, is a defaulting administrator, who has received large sums of money forming part of the estate of Francisco Suarez, deceased, and absconded. The judge below stated that he was not to be believed on his oath. Indeed, his counsel frankly stated that the appeal had not any merits, but, nevertheless, that he was entitled to succeed in point of law. [His Lordship then stated the facts down to the order of the Court of Appeal of July 30, 1914, varying the order of Joyce J., and continued :] It was not disputed that the defendant had waived his privilege so far as he could do it, but one contention raised was that he could only do it with the consent of his Government, and it had not been shown that he did obtain this consent. The first answer to this argument is that while he was Minister credit must be given to his acts, and it must be assumed that in the course which he took he was acting in accordance with the instructions of his Government. But the further answer is he did in fact obtain the authority of his Government, and his solicitors so informed the plaintiff in writing. [His Lordship stated the subsequent facts down to Sir Walter Langley's letter of September 21, 1917, and continued :] Thus the defendant no longer possessed any diplomatic privilege, and does not appear

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to have been in England since March 8, 1917. It is not a case in which a claim is made for a reasonable time to wind up the affairs of his legation. The defendant has not made any affidavit on this application, and it is not suggested that ample opportunity has not already been given him to wind up the business of the legation. Why, therefore, should not a writ of sequestration be issued to compel obedience to the orders of the Court? It was contended on behalf of the appellant that by virtue of 7 Anne, c. 12, s. 3, the proceedings taken against him were null and void, and that a Minister could not waive his privilege, and that any purported waiver was ineffective. It must, however, be remembered that s. 3 of the statute of Anne was merely declaratory of the common law, as its language shows. The recitals in the Act show the circumstances under which the Act was passed. They are well known and need not be repeated here. Sect. 3 provides: "And to prevent the like insolences for the future be it further declared"—not "be it further enacted." It has been frequently pointed out by many eminent judges that s. 3 of the Act was declaratory of the common law, and must therefore be construed according to the common law, of which the law of nations must be deemed a part. It was so pointed out by Lord Mansfield in *Triquet* v. *Bath* (1), by Lord Ellenborough in *Viveash* v. *Becker* (2), by Abbott C.J. in *Novello* v. *Toogood* (3), by Jervis C.J. and Williams J. in *Taylor* v. *Best* (4), by Lord Campbell in *Magdalena Steam Navigation Co.* v. *Martin* (5), and in the case of *The Parlement Belge.* (6)

The exemption from process accorded by the law of nations to Sovereigns and to Ambassadors and foreign Ministers, being for their benefit, may be waived by or with the permission of the Sovereign, in accordance with the maxim Quilibet potest renunciare juri pro se introducto. In *Mighell* v. *Sultan of Johore* (7) it was pointed out by the Court of Appeal that a foreign Sovereign might submit to the jurisdiction, Lord Esher adding (8): "everybody knows and understands that"; and the time when he can be

(1) 3 Burr. 1480.
(2) 3 M. & S. 284.
(3) 1 B. & C. 554.
(4) 14 C. B. 487.
(5) 2 E. & E. 94.
(6) 5 P. D. 197.
(7) [1894] 1 Q. B. 149.
(8) Ibid. 159.

said to elect, whether he will submit to the jurisdiction, is when the Court is being asked to exercise jurisdiction over him—for example, when he enters an appearance to a writ. And if a Sovereign can submit to the jurisdiction, why cannot an Ambassador or other foreign Minister with the consent of his Sovereign? Indeed, it may be for the benefit of such an one to come in and have some question determined in the Courts of the country to which he is accredited. In the present case, if the defendant had been honest, the proceedings might have established his right to a share of a large fund. It was held by the Court of Common Pleas in 1854 in *Taylor* v. *Best* (1) that a Minister might waive his privilege, and the Court there refused to set aside proceedings taken against M. Drouet, a public Minister, accredited by the King of the Belgians to the Court of St. James's. His attorney had given an undertaking to appear in the action, had duly entered an appearance, and had pleaded, and, after notice of trial, had obtained a rule for a special jury, and the Court refused his application to stay or set aside the proceedings. The doubt raised in that case—and stated by Maule J. to be—whether an Ambassador or public Minister can be brought into Court against his will by process not immediately affecting either his person or his property and have his rights and liabilities ascertained and determined was afterwards settled in favour of the Ambassador in the case of *Magdalena Steam Navigation Co.* v. *Martin.* (2) But the actual decision in *Taylor* v. *Best* (1) that a Minister may with the consent of his Sovereign waive his privilege notwithstanding the provisions of the statute of Anne has never been questioned from that time to the present. It was affirmed by Lord Campbell in *Magdalena Steam Navigation Co.* v. *Martin* (3), where he said, speaking of a public Minister: "if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." The contention on behalf of the defendant was founded upon a dictum of Lord Talbot in *Barbuit's Case* (4); but the passage referred to merely means, as the context shows, that, the privilege being for the sake of the Prince by whom an Ambassador is sent, the Ambassador cannot renounce such privilege and protection

(1) 14 C. B. 487.
(2) 2 E. & E. 94.
(3) 2 E. & E. 111.
(4) Cas. t. Talb. 281.

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without the consent of the Government which sent him: see also *Wilson* v. *McIntosh*. (1) This point, therefore, fails.

It was further urged on behalf of the appellant that as the order of March 7, 1917, fixing a definite date for payment was never served upon him it was irregular to issue a writ of sequestration. In support of this contention reliance was placed upon the terms of Order XLIII., r. 6, which provides for the issue of a writ of sequestration after due service of a judgment or order. The plaintiff, however, was not proceeding under this rule, which provides for the issue of a sequestration as of course, and without obtaining any order for the purpose. The plaintiff's application for leave to issue a writ of sequestration was made under Order XLII., rr. 4 and 24. The Court may dispense with service of the order altogether if it is satisfied that the defaulter knows of the order and is keeping out of the way. The object of requiring service is to establish that the person ordered to do something has been fully informed of what he is required to do. The Court has full jurisdiction to dispense with service of an order in proper cases. Here the defendant was personally present in Court when the order of January 30, 1917, was made, and indulgence was shown him, at his request, by giving him an opportunity of paying by instalments at fixed dates, all long since expired, and no payment whatever has been made. The defendant is in contempt, and, by keeping away, prevents any attachment of his person. A writ of sequestration is a process of execution against the estate which is said to have been first issued by Lord Keeper Bacon, and was resorted to by reason of the infirmity of the process of contempt, which is merely personal. The proceedings on a writ of sequestration are in rem, not in personam: see *Tatham* v. *Parker*. (2) There are many reported instances of the Court ordering the issue of a writ of sequestration when the defendant keeps out of the way and so prevents personal service of any order being effected upon him: see *Hyde* v. *Hyde* (3), *Allen* v. *Allen* (4), and *Rex* v. *Wigand*. (5)

In my opinion the order of Eve J. was quite right, and this appeal fails.

(1) [1894] A. C. 129.
(2) (1853) 1 Sm. & Giff. 506, 514.
(3) (1888) 13 P. D. 166.
(4) (1885) 10 P. D. 187.
(5) [1913] 2 K. B. 419.

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WARRINGTON L.J. This is an appeal by the defendant, Pedro Suarez, from the order dated October 23, 1917, giving leave to issue a writ of sequestration by reason of his failure to comply with an order of January 30, 1917, that he should lodge in Court 16,269*l.*, part of the estate of an intestate in his hands as administrator, and a subsequent order dated March 7, 1917, directing lodgment on or before a fixed date or afterwards within four days after service.

The first question is whether at the date of the order of October 23 the defendant was entitled to claim the privilege against legal process of a Minister of a foreign State. He had been the accredited Minister in this country of the Republic of Bolivia, but on September 21 the Foreign Office, by letter under the hand of one of the assistant secretaries, informed the plaintiff's solicitors that His Majesty's Chargé d'Affaires at La Paz had ascertained and reported by telegraph that the Bolivian Government had terminated his appointment as Bolivian Minister at the British Court, and that his name had accordingly been removed from the Diplomatic List. In my opinion this letter is for the purposes of the present matter sufficient evidence of the fact that at the date of that letter the defendant had ceased to hold the office of Minister. The privilege may, however, continue for a reasonable time after the Minister ceases to hold office in order that he may wind up the affairs of the legation and transfer them to his successor: *Musurus Bey* v. *Gadban.* (1)

In the present case, however, it is idle to suggest that on this ground the privilege still subsisted on October 23. The four-day order was made in the presence of the defendant's solicitors on March 7. On March 5 he had been personally served with an order to attend on March 9 to be examined as to his means. On March 8 he disappeared, and the plaintiff has heard nothing of him since. It is, in my opinion, clear that if it could be said in this case that there was any period of grace at all it had come to an end long before October 23, and that he did not then enjoy any privilege from process.

But it is said that by virtue of the Act of 7 Anne, c. 12, all the proceedings on which the order appealed from was made were

(1) [1894] 2 Q. B. 352.

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void by reason of the existence of the privilege at the date of their institution—that the privilege cannot be waived—and there was no jurisdiction to make the order appealed from.

On the facts there is no question that the defendant deliberately, and after consideration for which opportunity was afforded him and with the consent of his own Government, submitted to the jurisdiction. Further, he obtained on appeal a modification in his favour of the original judgment. He complied with it by carrying in and verifying the necessary accounts. He paid and transferred moneys and Consols into Court, and on the order for payment of the 16,269*l.* 4*s.* 9*d.* into Court being made he obtained the indulgence of being allowed to pay by instalments. The waiver in point of fact of the ambassadorial privilege is clear.

That in law an action which the privilege would have rendered impossible of prosecution may be continued effectually if the privilege is not insisted on was decided in 1854 by the Court of Common Pleas in *Taylor* v. *Best*. (1) The same point is assumed in the judgment of Lord Campbell C.J. in *Magdalena Steam Navigation Co.* v. *Martin* (2), decided in 1859. The dictum of Lord Talbot in *Barbuit's Case* (3) is, when properly understood, not adverse to this view. The context shows that the Lord Chief Justice is referring only to waiver with the consent of the Ambassador's Government.

The decision in *Taylor* v. *Best* (1) has never been overruled or questioned on this point; and in my opinion, even if we thought it wrong, this Court ought not after this length of time to overrule it. But I see no reason to doubt that the decision was correct.

There can, I think, be no question that independently of the statute the privilege of being free from process in this country, whether it be that of a Sovereign of another State or of an Ambassador of such a Sovereign, was capable of being waived, and that proceedings could validly be prosecuted if the privileged defendant submitted to the jurisdiction. It has frequently been pointed out by judges of great eminence that s. 3 of the statute of Anne, on which the present question turns, is merely declaratory of previously

(1) 14 C. B. 487. (2) 2 E. & E. 94.
(3) Cas. t. Talb. 281.

existing law. It appears by the preamble that the object was to preserve sacred and inviolable privileges which Ambassadors and other public Ministers have at all times been possessed of. Under these circumstances it would be a strange result if the effect of the statute were to alter the nature of the ambassadorial privilege to introduce a distinction between the case of a Sovereign himself and his Ambassador, and to render absolutely void as against the latter every action although it may be his desire, and, indeed, to his advantage, to submit to the jurisdiction. In my judgment the statute should be construed so as to maintain the privilege as it existed when it was passed and to render void only those writs and processes which are "sued forth or prosecuted" against the will of the privileged person.

Some reliance was placed on an expression of Davey L.J. in *Musurus Bey* v. *Gadban* (1) to the effect that there is a total want of jurisdiction to entertain an action against a person enjoying the privilege. The learned Lord Justice was not in that case considering the effect of waiver at all, but only the question whether the immunity of an Ambassador from action prevented the Statute of Limitations from running during the continuance of such immunity. The statement of the learned Lord Justice has no bearing on the present question.

I am of opinion, therefore, that the action was effectively prosecuted, and that the Court, notwithstanding the ambassadorial character of the defendant, had jurisdiction to make all the orders it made up to and including those on which the order for the issue of the writ of sequestration was founded. The last-mentioned order itself, being the order appealed from, was made when the privilege no longer existed, and was, in my opinion, properly made.

But a technical objection is taken on the ground that no time was fixed for payment by the order of January 30, and that the order of March 7 was not served. This objection would have been a good one if a writ of sequestration were issued under Order XLIII., r. 6; but in my opinion the absence of service does not prevent the Court from directing the issue of the writ in a proper case: see *Rex* v. *Wigand*. (2)

(1) [1894] 2 Q. B. 352, 361. (2) [1913] 2 K. B. 419.

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On the whole, in my opinion the appeal fails and must be dismissed.

SCRUTTON L.J. Pedro Suarez appeals from an order of Eve J. dated October 23, 1917. That order provides that as the Court is of opinion that Pedro Suarez has been guilty of a contempt of Court in not complying with two orders dated January 30, 1917, and March 7, 1917, by which he was ordered to pay into Court money which he held as representing the estate of a dead man, an order for sequestration shall issue against his estate.

Pedro Suarez objects to the order on two grounds: first, that he was when the proceedings were commenced the public Minister of the Republic of Bolivia accredited to this country, and therefore any process against him was null and void; secondly, that the first order for payment into Court does not specify a time for payment, and the second order, which does specify a time, was not served on him. To his claim of ministerial privilege it is replied that he was not when the order appealed from was made the public Minister of Bolivia, and that while he was such Minister he submitted to the jurisdiction with the assent and on the instructions of the Republic of Bolivia.

Mr. Russell, who appeared for Pedro Suarez, frankly opened his case as one entirely destitute of any merits. It appears that when it was proposed to administer the estate of Francisco Suarez, of parts of whose property both Nicolas and Pedro Suarez had possession, an originating summons was issued on January 26, 1914, by Nicolas Suarez, Pedro Suarez being a defendant, and on January 28 Pedro Suarez' solicitors, in stating their willingness to accept service of the summons, wrote that Pedro Suarez was willing to have the estate administered by the Court—in fact, he was considering taking some step himself. On January 29, 1915, his solicitors wrote that the President of Bolivia had authorized Pedro Suarez to waive his privilege in the case of the administration of Francisco Suarez. In these proceedings it was ascertained that Pedro Suarez had in his hands a large sum of money belonging to the estate. On January 30, 1917, he was ordered to pay 16,269*l.* into Court, the order not to be enforced if, on named dates, he paid in specified instalments of this sum. He

did not pay the first instalment, and he was on March 7, 1917, ordered to pay the whole sum into Court within four days. On March 8, 1917, he left the country, concealing his whereabouts from the Court. On September 21, 1917, the Foreign Office, through whom this Court obtains conclusive information as to the status of foreign dignitaries and their accredited representatives to this country (*Mighell* v. *Sultan of Johore* (1); *Foster* v. *Globe Venture Syndicate* (2)), informed the Court that the Bolivian Government had terminated the appointment of Colonel Suarez as Bolivian Minister at the British Court. It is therefore at a time when he has been six months absent from this country, and at least a month after his appointment as Minister has ceased, that he claims a privilege as Minister, having waived that privilege when he was Minister. Mr. Russell said quite accurately that his case had no merits in fact. But it was said that, however lacking in merits he was, he was in 1914 a public Minister, and that the statute of Anne (7 Anne, c. 12) had prescribed that all writs and processes which shall hereafter be sued forth whereby the person of any public Minister of any foreign State may be imprisoned or his goods be seized—"shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." The whole proceedings, therefore, were said to be null and void.

There are a large number of cases in which similar words have been construed by the Courts. This Court, in the recent case of *In re New Zealand Shipping Co. and Société des Ateliers et Chantiers de France* (3), has held that in contracts the Court will support an agreement, which by its express terms is void in certain events, by refusing to allow a person, who has by his own act brought one of those events to pass, to allege an invalidity caused by his own wrong. Thus where a lease is void on breach of a covenant the Court has not allowed the person who broke the covenant to allege the invalidity his breach has created. The effect of this is to make the lease not void but voidable at the option of the innocent party.

In numerous statutes, for a bewildering variety of reasons, the Courts have held transactions to be valid which the Legislature

(1) [1894] 1 Q. B. 149. (2) [1900] 1 Ch. 811.
(3) [1917] 2 K. B. 717.

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has apparently enacted to be invalid for all purposes whatsoever; while in other cases they have held that the words "void for all purposes" have what appeared to be their plain and ordinary meaning. The cases are collected in Maxwell on the Interpretation of Statutes, 5th ed. pp. 337-348. But one of the reasons where the Courts have declined to make a transaction void is where there is a personal estoppel against a party interested in and alleging invalidity. This is the reason given by Lord Cairns in *President and Governors of Magdalen Hospital* v. *Knotts* (1) for the numerous cases in which it has been held that corporation leases made by statute "utterly void" could yet not be invalidated by the corporation during the life of the head of the corporation by whom they were made. I am content to decide this case on that ground, for if ever there was a case where a man should be prevented from alleging the invalidity of a process it is where he has assented to its issue, taken part in the proceedings for three years, thus gaining time, and only alleged its invalidity when he is otherwise not entitled to the protection of an Ambassador or protected from a writ. But as on many of the general questions argued before us I have felt, and still feel, considerable doubts, I desire to say (1.) that in my opinion the nature and extent of the effect of appearing to a process which was null and void when it was issued may require close consideration in future cases. The effect of the Sovereign's appearing has been very carefully limited (see *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (2)), and I should desire to reserve my liberty to consider how exactly a writ issued without the consent of an Ambassador, and therefore apparently a nullity (see *Musurus Bey* v. *Gadban* (3)), is made an effective writ by the consent of the defendant and the extent to which it becomes effective. In this case I think the facts prevent this defendant from raising this point. (2.) I am not at all satisfied, in view of the way the greater part of the reasoning in *Taylor* v. *Best* (4) has been treated in subsequent cases (*Magdalena Steam Navigation Co.* v. *Martin* (5); *Musurus Bey* v. *Gadban* (3)), that *Taylor* v. *Best* (4)

(1) (1879) 4 App. Cas. 324, 333.
(2) [1898] 1 Ch. 190.
(3) [1894] 1 Q. B. 533; [1894] 2 Q. B. 352.
(4) 14 C. B. 487.
(5) 2 E. & E. 94.

can be treated, in a case where it has to be considered, as a satisfactory authority for anything.

The first point taken by the defendant in my opinion fails.

On the second point, the writ of sequestration is founded on contempt of an order, and cannot be issued without leave of the Court unless an order naming a time for the doing an act has been served on the defendant and disobeyed. But in this case the writ is issued with the leave of the Court, and Eve J. has found that Pedro Suarez knew about the two orders for payment and has left the country to evade service of the second order and payment of the sum in question. I should come to the same conclusion. The latter finding, that Pedro Suarez is evading service, is, within the decision of the Court of Appeal in *In re Tuck* (1), enough to justify the issue of the writ.

The appeal, in my opinion, fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Nelson, Son & Plews.*
Solicitors for respondents: *Darley, Cumberland & Co.*

(1) [1906] 1 Ch. 692.

W. I. C.

NEVILLE J.
1917
Oct 25, 26, 29.

MANN, CROSSMAN & PAULIN, LIMITED *v.* THE REGISTRAR OF THE LAND REGISTRY.

[Land Registry, Title No. 187141.]

Landlord and Tenant—Original Lease—Reversionary Lease to commence more than Twenty-one Years after its Date—Interesse Termini—Executory or vested Interest—Rule against Perpetuities—Land Registry.

The interesse termini which a reversionary lease, for a term to commence more than twenty-one years after its date, confers on the lessee is not an executory but an immediate vested interest, a right in rem capable of alienation and which passes to the executor. It is not an estate in the land, but an absolute proprietary right to take possession of the land when the stipulated time for the commencement of the term arrives. Such a reversionary lease, therefore, does not offend the rule against perpetuities, and the lessee is entitled, where the Land Registry Acts apply, to be registered as the proprietor of the lease with a good leasehold title.

The definition of an interesse termini by Bowen L.J. in *Gillard* v. *Cheshire Lines Committee* (1884) 32 W. R. 943 adopted.

Bewley J.'s statement of the rule against remoteness in *Redington* v. *Browne* (1893) 32 L. R. Ir. 347, 356, approved.

The plaintiffs were the lessees in possession of a public-house in Middlesex under a lease granted in 1896 for a term of fifty years expiring at Midsummer, 1946, at a rental of 36*l.* per annum. The lease did not contain a covenant for renewal.

In 1898 the lessor died, and under his will his widow was the tenant for life of the property with remainder to their four children equally, all of whom were of age. By a deed dated March 17, 1917, the widow, with the consent of her children, granted the plaintiffs a reversionary lease of the public-house for thirty years to commence from the date of the expiration of the existing lease, namely, Midsummer, 1946, in consideration of a premium of 250*l.* and of a rental of 36*l.* per annum. The registrar of the Land Registry declined to register the plaintiffs as proprietors with a good leasehold title of the reversionary lease in consequence of doubts which had for some time existed amongst conveyancers, and had been raised in text-books, as to the validity of a term commencing more than twenty-one years after the date of its grant as possibly offend-

ing the rule against perpetuities, and by his direction the lessees took out a summons under rr. 297 and 302 of the Land Transfer Rules, 1903, to obtain the decision of the Court on the matter.

Bryan Farrer, for the plaintiffs. The question raised by the summons is whether the grant of a lease to take effect in possession at a date more than twenty-one years distant is void as a perpetuity. The question is one of great importance, as there are very many reversionary leases of this kind in existence, and their validity has never been questioned except by text-writers. The question depends on (*a*) what does the rule against perpetuities lay down, and (*b*) what is the nature of the interest granted by a reversionary lease? As to (*a*): The common law did not restrain the creation of such interests as rights of entry for conditions broken, grants of rent-charges, easements, or terms of years within any fixed period. When trusts and executory limitations were invented the Courts required that such interests must vest within the maximum period of a life and lives in being and twenty-one years afterwards: Jarman on Wills, 6th ed. pp. 296, 307, 373 et seq.; *In re Garnham* (1); *Woodall* v. *Clifton* (2); *In re Frost* (3); *In re Hollis' Hospital and Hague's Contract* (4); *In re Da Costa*. (5) A lease like this gives the lessee an immediate vested interest with a right to take possession when the stipulated time arrives, to which the rule does not apply. Then as to (*b*): At common law every lease for a term creates an interesse termini, and the lessee acquires no estate in the land until he enters into possession under it; but if the lease is so framed as to be a bargain and sale under the Statute of Uses the possession is immediately executed in the lessee, so that no entry is necessary: Co. Litt., 19th ed. (1832), vol. i. 43b, 46b; vol. ii. 270a, 270b. The nature of an interesse termini has been considered in *Williams* v. *Bosanquet* (6); *Lock* v. *Furze* (7); *Doe* v. *Walker* (8); *Gillard* v. *Cheshire Lines Committee* (9); *Lewis* v. *Baker* (10); Cruise's Digest, 4th ed. vol. iv. p. 89; Halsbury's Laws of

(1) [1916] 2 Ch. 413.
(2) [1905] 2 Ch. 257.
(3) (1889) 43 Ch. D. 246.
(4) [1899] 2 Ch. 540.
(5) [1912] 1 Ch. 337, 342.
(6) (1819) 1 Brod. & B. 238, 256.
(7) (1865) 19 C. B. (N.S.) 96, 118.
(8) (1826) 5 B. & C. 111, 117-9.
(9) 32 W. R. 943.
(10) [1905] 1 Ch. 46.

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England, vol. xxii. p. 316; Woodfall's Landlord and Tenant, 19th ed. p. 232. In the Irish case of *Redington* v. *Browne* (1) the validity of such a reversionary lease was laid down. The point has not been raised in the English Courts, but in *Doe* v. *Cavan* (2), *Smith* v. *Day* (3), *Lord Llangattock* v. *Watney, Combe, Reid & Co.* (4), and *Knight* v. *City of London Brewery Co.* (5) there was such a reversionary lease, and its validity must have been assumed. I submit, therefore, that an interesse termini is not an executory interest but a vested proprietary right in the land, a right in rem, capable of alienation and which passes to the executor, and that the rule against perpetuities has no application whatever. [He also referred to Challis's Real Property, 3rd ed. pp. 117, 200, 217; Marsden on Perpetuities, p. 36; *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900). (6)]

J. G. Wood, for the lessor, adopted the same line of argument, and referred to *Williams* v. *Bosanquet* (7); Fearne on Contingent Remainders, 10th ed. vol. ii. p. 27; Gray on Perpetuities, 3rd ed. p. 94, ss. 114, 115, p. 302, p. 662, s. 971, n. (3.); *Law Quarterly Review* (1914), vol. xxx. p. 66; Williams' Real Property, 22nd ed. pp. 202-5, 517.

Austen-Cartmell, for the registrar. The application is not opposed by the registrar in a hostile spirit, but it is his duty to place the other point of view before the Court, because if the plaintiffs were registered as owners of the lease with a good leasehold title, and the instrument were afterwards to be held void, they might have a claim for compensation against the Treasury. It is submitted that this interesse termini is an executory interest. It is a mere interest in futuro which does not confer any estate in the property but gives a right which at the appropriate time will merge into an estate. It is really a future estate or interest which does not come into possession until more than twenty-one years after it is granted, and therefore it is within the rule against perpetuities. It becomes in rem the moment the right to enter and take possession under it arises: *Lord Llangattock* v. *Watney, Combe, Reid & Co.* (4); *Gillard*

(1) 32 L. R. Ir. 347, 355-357.
(2) (1794) 5 T. R. 567.
(3) (1837) 2 M. & W. 684.
(4) [1910] 1 K. B. 236; affirmed [1910] A. C. 394.
(5) [1912] 1 K. B. 10.
(6) [1910] 1 Ch. 12.
(7) 1 Brod. & B. 238.

v. *Cheshire Lines Committee.* (1) The rule of perpetuities is a judge-made rule, and since the Third Report (1830) of the Real Property Commissioners, pp. 35, 36, 43, the Courts have applied the rule to future and contingent interests which by the old common law would have been good: *London and South Western Ry. Co.* v. *Gomm* (2); *Dunn* v. *Flood* (3); *In re Hollis' Hospital and Hague's Contract* (4); *Lewis* v. *Baker* (5); *In re Ashforth* (6); *Lock* v. *Furze* (7); *In re Frost* (8); *Whitby* v. *Mitchell* (9); *Beard* v. *Westcott* (10); *In re Abbott.* (11)

[NEVILLE J. I do not quite follow the observations in Co. Litt. 270a.]

It is submitted the explanation may be that the learned author is referring in the first instance to two concurrent leases, one lease granted subject to and overlapping the other. The possession of the first lessee would apparently enable him to take a release of the reversion.

The opinions of text-writers on the validity of a reversionary lease to commence more than twenty-one years afterwards are conflicting, but the better opinion seems to be that such a lease offends the rule against perpetuities: Sanders on Uses, 5th ed. vol. i. pp. 201, 204; Watkins' Conveyancing, 8th ed. (1838) pp. 33 (n.), 34 (n.); Lewis on Perpetuities (1843 ed.), pp. 601-2, 613-14; Encyclopædia of the Laws of England, 1st ed. vol. x. p. 43; 2nd ed. vol. xi. p. 72; Williams' Vendor and Purchaser, 2nd ed. vol. i. p. 372; Key and Elphinstone's Conveyancing, 10th ed. vol. i. p. 1073; Williams' Real Property, 22nd ed. p. 516 (n.); Preston on Estates, vol. i. pp. 62-67; Sheppard's Touchstone by Preston (1821), vol. ii. pp. 272-3. The statement in Halsbury's Laws of England, vol. xxii. p. 316, is really founded on the assumption derived from *Smith* v. *Day* (12) and the other cases relied on, where such a reversionary lease was dealt with without comment, but in those cases, as in this, neither the lessor nor the lessee attacked the validity of the lease;

(1) 32 W. R. 943.
(2) (1882) 20 Ch. D. 562, 579.
(3) (1883) 25 Ch. D. 629; affirmed (1885) 28 Ch. D. 586.
(4) [1899] 2 Ch. 540.
(5) [1905] 1 Ch. 46.
(6) [1905] 1 Ch. 535, 540.
(7) 19 C. B. (N.S.) 118.
(8) 43 Ch. D. 246.
(9) (1890) 44 Ch. D. 85.
(10) (1822) 5 B. & Al. 801.
(11) [1893] 1 Ch. 54.
(12) 2 M. & W. 684.

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and in the Irish case of *Redington* v. *Browne* (1) the passage cited is only dictum and is not binding on this Court, and was not necessary for the decision of the case, and is not in accordance with the principle of *London and South Western Ry. Co.* v. *Gomm.* (2)

Bryan Farrer, in reply, referred to Jarman on Wills, 6th ed. p. 375. It is not disputed that an uncertain or contingent interest may be within the rule, but this is a present vested and certain interest in the land. It is not an estate, but a proprietary right to take possession at a future date: *Hyde* v. *Warden* (3); and there is nothing conditional or uncertain about it. It is analogous to a covenant for renewal: *Muller* v. *Trafford* (4), which is not within the rule; the only distinction is that in the one case there is a covenant to renew and in the other an independent grant. Here the lessee's entry in the future will merely enlarge his existing vested interest.

Austen-Cartmell, on the question of entry by a lessee to complete a lease at common law, referred to Williams' Real Property, 22nd ed. pp. 201-4, 516, Woodfall's Landlord and Tenant, 19th ed. p. 232, *Neale* v. *Mackenzie* (5), and *Miller* v. *Green.* (6)

NEVILLE J. What I really have to decide is whether the interest in question which may arise in possession more than twenty-one years hence is or is not a vested interest within the meaning of the rule against perpetuities. I have heard a very interesting discussion as to whether the law still requires an entry to perfect a lease, but I am not going to decide that question. I think, however, that the reference to the nature of an interesse termini in 2 Co. Litt. 270a in that connection is worthy of attention. He states it thus: "For before entry the lessee hath but interesse termini, an interest of a terme, and no possession, and therefore a release which enures by way of enlarging of an estate cannot worke without a possession, for before possession there is no reversion; and yet if a tenant for twenty years in possession make a lease to B. for five yeares and B. enter, a release to the first lessee is good, for he had an actuall possession, and the possession of his lessee is his possession.

(1) 32 L. R. Ir. 547.
(2) 20 Ch. D. 562.
(3) (1877) 3 Ex. D. 72, 77, 83-4.
(4) [1901] 1 Ch. 54.
(5) (1836) 1 M. & W. 747.
(6) (1831) 8 Bing. 92, 104, 106.

And so it is if a man makes a lease for yeares, the remainder for yeares, and the first lessee doth enter, a release to him in the remainder for yeares is good to enlarge his estate." Mr. Austen-Cartmell has pointed out that there may be a distinction between the case of one lease, so to speak, overlapping another and granted subject to the other, and two leases one beginning when the other terminates, and it is not easy to see from the words used which was intended by the learned author. Then again it has been observed that the statement is only with reference to the operation of the Statute of Uses. I confess I am not quite sure that the case where the lease is to commence at a future date when the lessor is in possession is identical with that of a lease by the lessor when his lessee is in possession at the time of the granting of the lease. I am not satisfied that in that case the taking possession by the lessee later in date is necessary. Mr. Joshua Williams certainly seems to have thought that both with regard to a lease dating from the present and with regard to a lease dating in futuro the lease might be made good, either under the common law if it was accompanied by possession or followed by possession, or under the Statute of Uses if it was made by bargain and sale. In that connection there is the interesting case of *Miller* v. *Green* (1), in which it is laid down that where a lease can enure either as a demise at common law or as a bargain and sale under the Statute of Uses it is for the lessee to say whether he will take it under the statute or as a common law demise. He may elect to treat the lease to him by his landlord from either point of view. The plaintiff in that case, however, could not elect, because he was not the lessee but a stranger to the lease. I say this by the way, because I do not feel prepared to assert as law that a lease in futuro must be accompanied or followed by possession to make it complete. Whether that be so or not, the question here is, having regard to the rule against perpetuities, whether the interesse termini, which undoubtedly the tenant in futuro takes, is a vested interest or whether it is an executory or contingent interest. I think if it is vested it does not come within the rule against perpetuities, but if it is executory or contingent it does.

I now turn to the definition of " vesting " in Fearne on Contingent Remainders, 10th ed. vol. ii. p. 27, where the matter is stated thus :

(1) 8 Bing. 92, 106.

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"When the right is a right of present possession, and the party is in possession, whether personally or by substitute, the estate is said to be vested in possession. When it is a present right of having the possession whenever it may become vacant by the determination of a preceding chattel interest, or whenever it may become vacant by the determination of a preceding freehold estate, or at some other future time to which only the possession is postponed; in each of these cases the estate is said to be vested in right or interest. And even when it is a present right of present possession, if such a right has been attended with the possession, but ceases to be so, the estate can only be said to be vested in right or interest." Applying that proposition to the present case, undoubtedly the interest here is vested in right or interest. It has been decided with regard to an interesse termini that it is alienable and passes on the death of the lessee to his executors, and consequently it seems to me impossible to say that it is not a right of taking possession whenever the land becomes vacant by the determination of a preceding chattel interest. I think that is a complete and perfect definition of the position we find here. So much for the general principle; but before passing from that I would refer to Cruise's Digest, 4th ed. vol. iv. p. 89, s. 21, where the author says: "Every estate and interest in lands and tenements may be assigned; as also every present and certain estate or interest in incorporeal hereditaments, such as rents, advowsons, &c., even though the interest be future, as a term for years to commence at a subsequent period, yet it may be assigned; for the interest is vested in praesenti, though only to take effect in futuro."

With regard to the decisions, strangely enough, the question whether a lease in futuro, not to come into effect until after the expiration of twenty-one years, is good or not has never been expressly decided by the English Courts. But in *Redington* v. *Browne* (1) in the Irish Courts the question was actually raised and decided, and Bewley J., who decided it, says: "I understand Mr. Redington's counsel to be prepared, if necessary, to contend that if a lease has been made for lives and for a term of years, of which more than twenty-one years are still unexpired, it is not competent for the lessor to make, or agree to make, *any* lease in reversion, to commence on the expiration of the subsisting term. This startling

(1) 32 L. R. Ir. 347, 355, 356.

proposition, however, would be clearly not in accordance with the law." That is the exact point raised in this case. Then the learned judge deals expressly with the rule against perpetuities, and says: "The object of the rule is to restrict the inalienability of property, and limit the period for which its absolute vesting may be postponed. If the future limitation is vested in interest in an ascertained living person at the time of the execution of the instrument by which it is created, or must necessarily vest within the period fixed by law, that is to say, within a life or lives in being and a period of twenty-one years afterwards, it is not open to the objection of remoteness; and it is immaterial that the actual enjoyment in possession may be deferred for a much longer period." With respect, I entirely agree with that exposition of the law, and I think Bewley J. accurately laid down the rule against perpetuities as it is, at all events, understood to-day. There has been no decision on the exact point in the English Courts, but I have been referred to several cases, of which *Lord Llangattock* v. *Watney, Combe, Reid & Co.* (1) is an instance, where the Courts seem to have recognized sub silentio the validity of terms to commence in futuro at a date exceeding the time limited by the rule against perpetuities, and I cannot but think that, if there was any real doubt about the question, the point could not have escaped observation in those cases. The real difficulty has arisen from what is to be found in the text-books. Some of them confidently state that such a lease is void; others with equal confidence state it to be valid; and others again say that the point is doubtful. I do not think I should serve any useful purpose by going in detail through their different views. They have all been very properly called to my attention, and of course, until the matter came to be expressly decided by the English Courts, such a difference of opinion could not be put an end to.

On the question of what is the nature of an interesse termini there is one case which I think is of great importance as indicating that in the true sense of the word it is a vested interest, an interest which conveys a right actually in the land itself although the time fixed for the commencement of the term has not arrived. I refer to *Gillard* v. *Cheshire Lines Committee*. (2) There the plaintiff

(1) [1910] 1 K. B. 236; affirmed [1910] A. C. 394.
(2) 32 W. R. 943.

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agreed to take a theatre for eight weeks to commence on a future day. Before the commencement of the term, and before entry by the plaintiff, the defendants by excavations on their property deprived the theatre of the support of the adjacent land so that the theatre was rendered unsafe and was closed during the eight weeks by order of the proper local authorities. The plaintiff sued the defendants in respect of the damage suffered by him in consequence of their acts, and was held entitled to maintain his action. Bowen L.J. in the course of his judgment says: "When that demise was made to the plaintiff he had vested in him an interest known to the law as an interesse termini. That is more than a right of entry; it is an interest which the law recognises in a future term, coupled with a right to complete that interest by possession. If that was a bare right of action arising out of contract it would not give such an interest in the property as probably would entitle the owner to bring an action against anyone who interfered with the property. But it seems to me that this right is a right in rem, a right which is alienable at common law, a right which not only passes to the executor, as pointed out in Williams' Saunders, but can be granted away." If that is not a definition of a vested interest in the land itself I fail to understand the meaning of the learned judge's words. I think it very strongly confirms the conclusion at which I have arrived, that, with regard to the rule of perpetuities, this reversionary lease is a vested interest which does not come within the mischief of the rule. I hold, therefore, that the plaintiffs are entitled to be registered with a good leasehold title in respect of this lease. There will be a declaration that the lease is not void as offending the rule against perpetuities, with a direction to the registrar to proceed with the plaintiffs' application. I ought to add that the registrar was perfectly right, having regard to the obvious differences that had arisen amongst the lawyers, to require the matter to be brought before the Court because he could not on his own authority have decided it.

Solicitors: *Crossman, Prichard & Co.; Wrensted, Hind & Co.; The Treasury Solicitor.*

H. L. F.

In re KNIGHT'S SETTLED ESTATES.

NEVILLE J.

1917

Nov. 15.

[1917 K. 351.]

Settlement—Incumbrance—Jointure charged on Part of the settled Estates—Sale of that Part—Jointure attaching to Proceeds of Sale—Power of Tenant for Life to transfer Jointure to unsold Part of the Estates—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 5, 20.

The beneficial operation of s. 5 of the Settled Land Act, 1882, is not limited to incumbrances having priority over the settlement under which a sale is made under the Act, but extends to incumbrances arising under the settlement which are overreached by the sale and attach to the proceeds of sale.

Therefore on a sale under the Act a tenant for life can under s. 5, with the consent of a jointress, transfer her jointure rent-charge attaching to the proceeds of sale to the unsold part of the settled estates.

The words "on a sale" in s. 5 are not limited to cases where a sale has been made, but also include a contemplated or intended sale.

ADJOURNED SUMMONS.

By the settlement made June 15, 1870, on the marriage of Montagu Knight with Florence Hardy, to which Edward Knight, the father of Montagu Knight, was a party, Edward Knight covenanted with Florence Hardy, and also separately with the trustees of the settlement, that he would by his will charge some freehold hereditaments in the county of Hants with payment to Florence Hardy after the decease of Montagu Knight and thenceforth during her life of an annual rent-charge of 500*l.* per annum (reducible to 300*l.* per annum in a certain event), with usual powers of distress and entry if and when the same should be in arrear, and would also limit a term of 200 years upon trust to secure the same.

Edward Knight, by his will dated February 17, 1876, after appointing trustees and executors thereof, and after confirming the settlement made on June 15, 1870, on the marriage of his son Montagu Knight with Florence Knight (formerly Florence Hardy), devised and appointed all his manors and hereditaments in the county of Southampton (of which the Neatham Manor Farm formed part) upon the trusts and for the purposes thereinafter

NEVILLE J. declared—that was to say, as to the Neatham Manor Farm estate the testator charged the same with the jointure rent-charge of 500*l.*, or 300*l.* (as the case might be), by the settlement of June 15, 1870, covenanted to be charged on freehold hereditaments in the county of Southampton, and limited a term of 200 years for better securing the same, and directed that from and after his decease the hereditaments so charged should go and remain to his son Montagu Knight for life and after his decease to the use that Florence Knight should receive out of the rents thereof a yearly rent-charge of 500*l.* (reducible to 300*l.* in a certain event) commencing on the decease of her said husband, with remainder to trustees for a term of 200 years for better securing the same rent-charge, and as to all the hereditaments thereby devised and appointed (except the Neatham Manor Farm estate) to trustees for a term of 600 years upon the trusts declared concerning the same, with remainder to Montagu Knight for life, with remainder as to the Neatham Manor Farm estate and all other the hereditaments thereby devised or appointed to every son of Montagu Knight successively in tail male (which limitations never took effect), with remainder to Charles Knight for life, with remainder to every son of Charles Knight successively in tail male, with remainders over.

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KNIGHT'S SETTLED ESTATES, *In re.*

The testator died in 1879. Charles Knight died in 1912. Montagu Knight died in 1914 without ever having had any issue, and thereupon Lionel Knight, who was the eldest son of Charles Knight and was born in 1872, became beneficially entitled as tenant for life in possession to the settled estates.

The tenant for life, in order to provide capital moneys for the purpose of paying the estate duty which became payable on the death of Montagu Knight in respect of the whole of the settled estates, proposed to sell by public auction the Neatham Manor Farm estate, and was desirous of exercising the power conferred on a tenant for life by s. 5 of the Settled Land Act, 1882, by transferring Florence Knight's jointure rent-charge with her consent to other parts of the settled estates. The question having arisen whether he could so exercise the power, having regard to the opinions of text-writers, he issued a summons to determine the matter.

H. Johnston, for the tenant for life. If the jointure is created in pursuance of the covenant in the marriage settlement it would have priority over the settlement created by the will and there would be no question that s. 5 applies. But the covenant was in general terms and the lands were unascertained, and the jointure is in fact a charge arising under the settlement and not one having priority to the settlement, and the tenant for life wishes with the consent of the jointress to transfer that charge to other parts of the estates. The words of the section are wide enough for that purpose, but in the note to the section in Wolstenholme on Conveyancing Acts, 9th ed. p. 343, it is said that the section only applies to incumbrances having priority over the settlement. It is submitted, however, that the power conferred on a tenant for life by the section is not exhausted by giving a clear title to a purchaser by a conveyance under s. 20 of the Act. The tenant for life will be greatly hampered if he cannot transfer this charge, which will attach to the proceeds of sale, to another part of the estates so that he can apply the whole of the purchase-money in discharge of the estate duty.

F. E. Farrer, for the trustees. It is the duty of the trustees to submit that s. 5 does not apply to an incumbrance which can be overreached by a tenant for life's conveyance under s. 20, although such a construction would no doubt greatly restrict the beneficial operation of s. 5. Assuming that the words "on a sale" in s. 5 are not limited to cases where a sale has been made but include a contemplated or intended sale——

[NEVILLE J. I think that is so.]

Then, admitting that a jointure is an "incumbrance" within the section, the onus is on the trustees to show to what extent (if any) the language of the section ought to be restricted: *In re Earl of Strafford and Maples.* (1) Under s. 53 of the Act a tenant for life in exercising any of the powers under the Act must have regard to the interests of all parties entitled under the settlement, and in relation to his exercise of the power is to be deemed a trustee for those parties. Proceeds of sale have been held applicable to discharge arrears of a jointure rent-charge: *In re Duke of Manchester's Settlement* (2); and a tenant for life will be restrained from mortgaging part of the settled land not already mortgaged, if the

(1) [1896] 1 Ch. 235, 241. (2) [1910] 1 Ch. 106.

NEVILLE J. 1917 KNIGHT'S SETTLED ESTATES, *In re.*

mortgage will be injurious to others interested under the settlement: *Hampden* v. *Earl of Buckinghamshire.* (1) Assuming that the tenant for life proceeds with the sale of this farm without the jointress applying for an injunction, still, when he under s. 21, sub-s. 2, and s. 22, sub-s. 2, calls on the trustees to apply all the purchase-money in payment of the estate duty on the whole of the settled land they might, even when the jointress did not actively interfere, say that, under s. 21, sub-s. 2, the jointure was a first charge on the proceeds of sale in priority to his power under s. 22, sub-s. 2, to direct the application of the purchase-money; or alternatively, that his direction to apply all the purchase money in discharge of the estate duty would be a quasi-breach of trust, if it were injurious to the interests of other parties entitled under the settlement: *Hampden* v. *Earl of Buckinghamshire.* (1) The text-writers, with varying degrees of confidence, state that s. 5 is or may be restricted to incumbrances which are not overridden by the tenant for life's conveyance: Clerke's Settled Land Acts, 2nd ed. pp. 48, 49; Wolstenholme and Brinton on Conveyancing Acts, 6th ed. p. 249 (of which edition Mr. Wolstenholme himself was one of the editors); Wolstenholme and Cherry on Conveyancing Acts, 9th ed. p. 343; Key and Elphinstone's Conveyancing, 10th ed. vol. ii. p. 298 (n.); and Hood and Challis' Conveyancing, 6th ed. p. 214.

P. Wheeler, for the jointress, supported the plaintiff's contention. In *In re Mundy and Roper's Contract* (2) Lindley M.R. and Chitty L.J. point out that the Act of 1882 and the subsequent Acts ought to be construed by the Court on broad principles and in a spirit of wise and reasonable liberality, and I ask the Court to construe s. 5 on those principles.

NEVILLE J. This summons raises a short but very important question under s. 5 of the Settled Land Act, 1882, which provides that "Where on a sale, exchange, or partition, there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate

(1) [1893] 2 Ch. 531. (2) [1899] 1 Ch. 275, 289.

or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly." To that section there is this note in Wolstenholme on Conveyancing Acts, 9th ed. p. 343: "'Incumbrance' within the meaning of this section includes a charge having priority to the settlement, though no money has been actually raised under it, but not a charge created by, or in exercise of any power in, the settlement, on which no money has been actually raised. The last mentioned charge is, but the other is not, overreached by the conveyance of the tenant for life under s. 20 (2.). A substituted security on any other part of the settled land may be given under this section for any charge not overreached." That note in different words has found its way into several other text-books to which I have been referred, and they seem to be unanimous as to its accuracy. But in my opinion the view there expressed as to the operation of s. 5 is erroneous, and it is easy to understand how such a mistaken view came to be accepted by the text-writers, because on a superficial consideration of the section one asks oneself, if a tenant for life can with the consent of an incumbrancer whose incumbrance has priority over the settlement transfer the charge so as to sell free from the incumbrance, why should he have to get the consent of an incumbrancer to transfer an incumbrance which is overreached by the sale and which attaches to the proceeds of sale? But if one looks a little deeper into the section one sees that view is erroneous, because it overlooks the fact that, although the incumbrance on the land is discharged by a conveyance under s. 20 of the Act, the incumbrance itself is not overreached but attaches to the proceeds of sale, and that the tenant for life may wish to transfer it to another part of the settled estates. Consequently the power of the tenant for life to use the whole of the proceeds of sale will be hampered if he cannot, as here, use those proceeds without limitation as capital money arising under the Act. The great convenience of giving a wide interpretation to the words used in s. 5 is obvious. I have carefully considered the section and I can see nothing whatever in its language to limit its beneficial operation as suggested by text-writers, and if their view is right a great benefit given to the tenant for life would be withheld from him. I hold, on the construction of the section, that an incumbrance, although overreached by a sale and attaching to the proceeds of

NEVILLE J. 1917 KNIGHT'S SETTLED ESTATES, *In re.*

sale, is within the beneficial operation of the section. There will be a declaration that on a sale of the Neatham Manor Farm estate the tenant for life may with the consent of the jointress charge the jointure rent-charge on other parts of the estates settled by the will of the testator.

Solicitors: *Andrew, Wood, Purves & Co., for G. Brook Knight, Farnborough; Evans, Wadham & Co.*

H. L. F.

NEVILLE J. 1917 *Nov.* 16, 19.

FLINT *v.* ATTORNEY-GENERAL.

[1917 F. 621.]

Army—Military Service—Calling-up Notice—Claim to Exemption—"Regular ministers of any religious denomination"—Action in High Court for Declaratory Judgment—Tribunal to determine Question—"Civil Court"—Jurisdiction—Army Act, 1881 (44 & 45 *Vict. c.* 58), *ss.* 154, 190, *sub-ss.* 31, 35—*Reserve Forces Act*, 1882 (45 & 46 *Vict. c.* 48), *ss.* 12, 15, 28—*Military Service Act*, 1916 (5 & 6 *Geo.* 5, *c.* 104), *s.* 1, *sub-s.* 2; *Sched. I., par.* 4—*Military Service Act*, 1916 (*Session* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1, *sub-ss.* 1, 2.

Where a man served with a calling-up notice under the Military Service Act, 1916, claims to be exempt from military service as being within the exceptions in the First Schedule to the Act, he is by s. 1 of the Act restricted to proving his claim before a "civil Court" as defined by s. 190 of the Army Act, 1881, i.e., a Court of summary jurisdiction, which has the same meaning as in the Summary Jurisdiction Act, 1879.

Therefore an action by him in the High Court against the Attorney-General for a declaration that the notice is ultra vires and void as against him on the ground that he is within an exception in the schedule, even although commenced before the expiration of the notice and before an offence under the Act has been committed, will not lie, the High Court not being a "civil Court" within the above statutory definition.

WITNESS ACTION.

This was an action to obtain a declaratory judgment that the plaintiff was exempt from military service under these circumstances.

The parents of the plaintiff were members of the Society of

Friends. In 1911, when he was about twenty years of age, he entered "The Bible Institute" at Glasgow as a student. This institute was a theological college not connected with any religious denomination. After a course of three and a half years' study he was granted a diploma by the institute, and in June, 1914, joined the staff of the Evangelization Society of London. This society was managed by a committee of laymen belonging to various religious denominations, but was not connected with any particular denomination. In July, 1914, he undertook at the request of the society the charge of four mission-halls in the parish of Egham, Surrey, at the salary of 2*l.* a week, which the society paid him. The halls were private property and were used exclusively for religious purposes, but were not connected with any religious denomination, nor were they licensed in any way. The plaintiff conducted services at the halls on Sundays and other days, but did not use any particular form of service. He held Sunday schools for children. He visited the sick, and devoted the whole of his time to his religious duties.

On June 19, 1917, he was served by the military authorities with the usual calling-up notice under the Military Service Acts, 1916, requiring him to join the colours at Woking on July 3, and on July 2 he issued the writ in this action. By his statement of claim he alleged that he was at all material times a regular minister of a religious denomination—that was to say, he was wholly employed by and under the auspices of the London Evangelization Society at a salary of 2*l.* a week as a minister and preacher of the Gospel of the Christian religion, and had the entire pastoral charge of four congregations of Christian people meeting together at Egham, Surrey, and that he had no occupation other than that above described; that he at no time belonged to the Army Reserve under the provisions of the Military Service Acts, 1916; that the notice of June 19, 1917, was illegal; and he claimed a declaration (1.) that he was under no obligation to comply with the said notice, and (2.) that the notice was illegal and ultra vires and of no effect as against him. The Attorney-General by his defence did not admit the plaintiff's allegations, and pleaded that the action was not maintainable against him.

After the expiration of the notice the military authorities issued

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a summons under the Military Service Act, 1916, against the plaintiff for his non-compliance with the notice, and the summons was standing over pending the trial of this action.

Compston, K.C., and *E. Williams*, for the plaintiff. An action will lie in this Court against the Attorney-General as representing the Crown in matters affecting the rights of a subject: *Dyson* v. *Attorney-General.* (1)

Austen-Cartmell (*Branson* with him), for the Attorney-General. I shall submit as a matter of law that this action is not maintainable.

NEVILLE J. I think I ought not to express any opinion on the facts of the case until I have decided this question of jurisdiction.

Compston, K.C. In *Dyson* v. *Attorney-General* (1) the plaintiff claimed a declaratory judgment, and an interlocutory application to dismiss the action on the ground that the Court had no jurisdiction failed; and at the trial of the action (2) a declaratory order was made, and Cozens-Hardy M.R. agreed with the observations of Fletcher Moulton and Farwell L.JJ. on the interlocutory application on the argument ab inconvenienti. This action is based on those observations. The Military Service Act, 1916, is a new Act, and so far has only been considered by a Divisional Court on cases stated by justices, and all that the Divisional Court could do was to consider whether there was evidence on which the finding of the justices could be supported. When an offence is alleged to have been committed under the Act the natural tribunal to decide would be the justices on a summons taken out by the military authorities. But here no offence had been committed when the writ was issued and no summons had been taken out, and it is reasonable that the plaintiff should have his rights determined in this action. The Court has a discretion in the matter, and should, it is submitted, on the facts exercise its discretion in his favour. On the merits we rely on *Offord* v. *Hiscock.* (3)

Austen-Cartmell. This case is not within *Dyson* v. *Attorney-General.* (4) All that case decides is that where the Attorney-

(1) [1911] 1 K. B. 410, 418, 423.
(2) [1912] 1 Ch. 158, 168.
(3) [1917] W. N. 326.
(4) [1911] 1 K. B. 410, 415.

General would be an actor in the High Court in proceedings to enforce a penalty there the subject can bring an action against him for a declaratory order to forestall the proceedings. Here the plaintiff is asking for relief in respect of a matter in which the Legislature has laid down a certain procedure under the Military Service Acts. By virtue of sub-ss. 1 and 2 of s. 1 of the Military Service Act, 1916 (Session 2), the plaintiff, unless he is within the exceptions in the First Schedule to the Military Service Act, 1916 (referred to as the principal Act), became as from the appointed day—which in this case was twenty-one days after February 10, 1917—a member of the reserve for the period of the war, to whom all the provisions of the principal Act apply; and, by sub-s. 2 of s. 1 of the principal Act, the Army Act, 1881, and the Reserve Forces Act, 1882, and the orders and regulations made thereunder apply to any man in the reserve, "provided that—(*a*) where the question, whether a man is a man who, under this section is deemed to have been enlisted and transferred to the reserve or not, is raised on proceedings in respect of an offence alleged to have been committed by a man as a member of the reserve whilst he was a member of the reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the reserve for permanent service, that question shall be decided only on proceedings before a civil Court." Then by the Reserve Forces Act, 1882, s. 12, in cases of national danger the reserve forces may be called out on permanent service, and by the joint operation of ss. 15 and 16 of the Reserve Forces Act, 1882, and s. 154 of the Army Act, 1881, a constable may apprehend a reservist who fails to appear when called up for permanent service and bring him before a Court of summary jurisdiction; and by sub-ss. 31 and 35 of s. 190 of the Army Act, 1881, the expression "civil Court" means with respect to any offence "a Court of ordinary criminal jurisdiction, and includes a Court of summary jurisdiction," and the expression "a court of summary jurisdiction," as regards England, has the same meaning as in the Summary Jurisdiction Act, 1879. The plaintiff is admittedly a reservist, and therefore, unless he is within the exception in the First Schedule of the Act of 1916, he commits an offence if he does not comply with the calling-up notice, and is liable to be prosecuted by the military

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authorities before a "civil Court" as defined by the Army Act, 1881, which does not include the High Court, and the question whether he is within the exception is to be decided by the statutory tribunal appointed by the Legislature. Therefore the jurisdiction of the High Court is ousted, and the case falls within the principle of *Barraclough* v. *Brown* (1), *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (2), and *Rex* v. *Morn Hill Camp Commanding Officer.* (3) On the facts the recent case of *Robins* v. *Wood* (4), decided by a Divisional Court, is in our favour. There a lay preacher of the Church of England was held not to be a regular minister of a religious denomination, and from the shorthand notes of the proceedings it also appears that the question of jurisdiction was raised during the arguments. Counsel for the appellant said that steps had been taken, following the precedent of *Dyson* v. *Attorney-General* (5), to obtain a declaration as to the appellant's status, and Avory J. said: "You might just as well, when a man is being prosecuted for felony, bring an action against the Attorney-General for a declaration that he is not a felon." Rowlatt J. said: "That would be more reasonable, because the Attorney-General is Attorney-General ex officio to prosecute generally, but he is not Attorney-General ex officio for this." It is submitted, therefore, that, a statutory tribunal having been appointed to determine questions arising under the Act of 1916, an action in the High Court for a declaratory judgment will not lie.

Compston, K.C., in reply. The observations of the Court in *Robins* v. *Wood* (4) were obiter. It is not disputed that the justices have jurisdiction, but the question here is whether, under this particular Act, they have exclusive jurisdiction where an action for a declaratory judgment has been commenced before any proceedings before them have been taken and before an offence under the Act has been committed. Sect. 166 of the Army Act, 1881, shows that they have not jurisdiction in every case.

NEVILLE J. The plaintiff, who is a British subject and has been called up by a notice served upon him after the appointed date,

(1) [1897] A. C. 615.
(2) [1898] 2 Ch. 331.
(3) [1917] 1 K. B. 176, 181.
(4) [1917] W. N. 302.
(5) [1912] 1 Ch. 158.

asks for a declaration that he is under no obligation in law to comply with that notice, and that the notice is illegal and of no effect. The question—and it is a very important question—is whether such an action will lie. The matter turns almost wholly upon the sections of the Army Act, 1881, the Reserve Forces Act, 1882, and the Military Service Acts, 1916, which have been cited to me, and the material sections in those Acts are set out in a note at the end of the case of *Rex* v. *Morn Hill Camp Commanding Officer*. (1)

The first question on those sections is, has the Legislature pointed out the tribunal to determine the question whether or not the plaintiff is, as he alleges, within the fourth exception in the First Schedule of the Act of 1916 ? That exception is in relief of " men in Holy Orders or regular ministers of any religious denomination." The plaintiff alleges that he is a regular minister of a religious denomination and on that ground is not within the provisions of the Acts at all, and consequently that the notice served on him was bad. Whether he is right or wrong in his contention that he is within the exception in the schedule is a matter upon which I do not propose to say a single word, because I have come to the conclusion that an action of this kind under the circumstances will not lie in this Court. In my opinion the High Court is not included in the definition of a " civil Court " which has to be the tribunal in the present case. It is not a Court of ordinary criminal jurisdiction, nor is it a Court of summary jurisdiction. The matter is not without difficulty, but I think that the High Court is not one of the Courts in which under the provisions of the Acts in question a person who is enlisted under the provisions of the Military Service Act, 1916, can have his claim decided. I wish, however, to add that I associate myself entirely with what was said by Fletcher Moulton L.J. and Farwell L.J. with regard to the argument ab inconvenienti, and in my opinion it would be a very serious thing for the public if the Courts in any way unduly limited their right of giving relief to subjects even though the disputes in which they find themselves involved are disputes with departments which in a sense represent the executive of the Crown. Here there is no such difficulty, because although persons who

(1) [1917] 1 K. B. 176, 181.

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are dissatisfied with the action of the military authorities are restricted to proving their rights in the civil Courts, giving to them the limited definition in the Army Act, 1881, still they are not precluded from getting a decision from the High Court with regard to any question of law which may arise. That being so, none of the dangers that have been pointed out in the cases will arise from the High Court holding that it has no jurisdiction to interfere in this particular matter. Now, if the view that I have taken of the statute is right that the Legislature has determined the tribunals before whom proceedings of this kind are to be taken, and only to be taken, then, of course, there is an end of the matter. But if it be not a question of jurisdiction but of discretion, I come to precisely the same conclusion, because I cannot imagine anything more inconvenient than the position which would result from deserting the ordinary method of ascertaining the position and rights of persons, who prima facie are liable to serve under the Military Service Act, by instituting a series of High Court actions which probably would be decided about the termination of the war. Therefore, if it is a question of discretion, I have no hesitation in exercising that discretion and refusing to entertain the case. But in my opinion it is not a question of discretion. It is a case where an action will not lie, the Legislature having pointed out a different tribunal by whom the matter must be decided. The action will therefore be dismissed.

Solicitors: *Engall & Crane; The Treasury Solicitor.*

H. L. F.

EVE J.
1917
Nov. 16.

In re LOVELESS.
FARRER *v.* LOVELESS.

[1917 L. 726.]

Will—Construction—Gift of "a clear annuity"—Income Tax payable by Annuitant.

Testator gave his residuary real and personal estate to trustees upon trust, as to a share thereof, to pay to his wife out of the income "a clear annuity of 2000*l.* during her widowhood," and in the event of her marrying again, then, during the remainder of her life, a clear reduced annuity of 1000*l.*:—

Held, that the annuity was not given free of income tax.

ADJOURNED SUMMONS.

By his will, dated July 18, 1902, Thomas Henry Loveless, of 76, Harley Street, London, after appointing executors and trustees, made certain specific bequests, and gave various legacies and annuities, and devised a freehold messuage known as "Aldenham," Leamington, to the use of his sister. The testator authorized his trustees to appropriate a sufficient part of his estate, and the investments representing the same, to answer these annuities, and he directed that all the legacies, pecuniary or otherwise, and the annuities thereinbefore bequeathed were to be paid and enjoyed free of estate, settlement estate, legacy, or succession duty becoming payable thereon at his death, but this direction was not to extend to the devise of Aldenham. The testator then devised all the real estate and personal estate not otherwise specifically disposed of to his trustees upon trust for sale and conversion, and out of the moneys to arise therefrom to pay his funeral and testamentary expenses and debts, and to pay or provide for the legacies and annuities thereinbefore given, and to invest the residue as therein mentioned. By clause 15 of his will the testator directed that his trustees should stand possessed of two equal third parts of the trust fund (therein called the "children's fund") upon trust, out of the income thereof, to pay to his wife "a clear annuity of 2000*l* during her widowhood" commencing from his death, and in the event of her marrying again, then, during the remainder of her life, a clear reduced annuity of 1000*l.* for her separate use, without

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power of anticipation; and he authorized his trustees to appropriate and retain out of the "children's fund" a sufficient portion for answering the annuity, with power to resort to the capital of the appropriated fund in case the income therefrom should at any time prove insufficient; and, subject as aforesaid, to hold the "children's fund" and the income thereof in trust for all his children who being male should attain twenty-one, or being female should attain that age or marry under it, and in default of children for other beneficiaries.

The testator died on November 12, 1916. The plaintiff, Arthur Richmond Farrer, was one of the two surviving executors and trustees of the testator, and by an originating summons asked, inter alia, whether the respective annuities of 2000*l.* given to the defendant, Edith Jane Loveless, during her widowhood and of 1000*l.* in the event of her remarriage were given to her free of income tax, or whether she had to bear the income tax in respect thereof.

The respondents to the summons were the widow, two servants claiming to be legatees, other beneficiaries entitled to the residuary estate subject to the annuities, and the remaining executor and trustee, who was also a beneficiary.

J. M. Paterson, for the plaintiff.

Sanger, for the annuitant. The word "clear" in this gift must mean "clear of everything." It is a question of construction of this particular will. There are many cases on the meaning of the words "free of deductions" and "clear of all duties," but none where the word "clear" has been construed entirely by itself. In the case of *Wall* v. *Wall* (1), where the words were "clear of all taxes and deductions," the Court held that the annuity there given was subject to property tax. That case was reversed by *Lord Lovat* v. *Duchess of Leeds* (*No.* 1) (2), where it was held that income tax came within the words "taxes affecting the hereditaments." Then in *In re Bannerman's Estate* (3), where annuities were given to a wife "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever," Hall V.-C. held that the widow was

(1) (1847) 15 Sim. 513. (2) (1862) 2 Dr. & Sm. 62.
(3) (1882) 21 Ch. D. 105.

entitled to be paid the annuities in full without the deduction of income tax. That case comes near to the present. In the case of *Gleadow* v. *Leetham* (1) the words "clear yearly sum of 600*l*." were followed by the words "free from all deductions and abatements whatsoever"; Kay J. held that the annuity was not given free from income tax. A similar case was *Peareth* v. *Marriott*. (2) The latest cases are *In re Crawshay* (3) and *In re Saillard*. (4) In the present case there is nothing to cut down the word "clear," while in all the other cases it has been coupled with other words of interpretation or limitation.

F. E. Farrer, for the residuary legatees. In effect a testator giving an annuity free of income tax gives two annuities—the sum he names and the income tax thereon. The word "clear" can be here satisfied by reading it as clear of legacy duty. It would also be extremely difficult for the trustees to know what sum to appropriate to meet the fixed annuity and the further sum representing the income tax from time to time payable. The cases of *Peareth* v. *Marriott* (2) and *Gleadow* v. *Leetham* (1) are in my favour. So also is *Abadam* v. *Abadam* (5), where an annuity given "to be payable without any deduction whatever" was held to be not given free of income tax. The cases relied upon by the other side can be clearly distinguished, and this case comes within *Wall* v. *Wall* (6) and *In re Saillard*. (4) This annuity therefore is not given free of income tax. [He also referred to *Turner* v. *Mullineux* (7), where the testator had described income tax as a "deduction," and *In re Buckle*. (8)]

EVE J. The question asked by this summons raises a very neat issue. Does the gift of a "clear" annual sum of so much amount to a gift of that sum and the income tax payable for the time being in respect thereof? I cannot say what conclusion I might have arrived at had there been no previous decisions on similar gifts to guide me to a right conclusion, but, on the cases as they stand, I am satisfied that I should be departing from a well-established rule were I to hold that the addition of the word "clear" is, in

(1) (1882) 22 Ch. D. 269.
(2) (1882) 22 Ch. D. 182.
(3) (1916) 60 Sol. J. 275.
(4) [1917] 2 Ch. 140, 401.
(5) (1864) 33 Beav. 475.
(6) 15 Sim. 513.
(7) (1861) 1 J. & H. 334.
(8) [1894] 1 Ch. 286.

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itself, sufficient to carry with it the additional gift of the income tax. The question has been considered in a number of cases where other words have been added to the word "clear," such, for example, as "of all taxes" and "of all deductions," and Mr. Sanger has argued that these other words have had the effect of interpreting and in some cases limiting the meaning of the word "clear." To some extent this may be true, but in two cases at least the Court has considered the effect of the word "clear" apart from the superadded words. In the case of *Peareth* v. *Marriott* (1), which came first before Wood V.-C., then before Bacon V.-C., and finally before the Court of Appeal, Bacon V.-C. held that a gift of "the clear annual income" was, on the construction of the whole will, a gift of the income free of income tax, but when his decision came up for review before the Court of Appeal, and it was found that by the order made by Wood V.-C. in 1861 the gift had in effect been interpreted as a gift of the annual income clear of all deductions except income tax, the Court held that the point was res judicata, and accordingly the order of Bacon V.-C. was discharged; but, in referring to the earlier order of Wood V.-C., the Master of the Rolls, in the course of his judgment, not only says that it was an adjudication of the rights, but adds that the order was, in his opinion, perfectly right. From this it appears that a gift of "the clear annual income" is not a gift of the income tax in addition. And, indeed, if the judgment of Bacon V.-C. is referred to, it will be seen that he did not rely on the word "clear," but upon a separate direction in the will that no deduction was to be made from any of the legacies. He says: "If it stood only on the gift of a clear annuity of 1500*l.* I should have no doubt that the annuitant is bound to bear this burden." So that both the Vice-Chancellors and the Court of Appeal were all agreed upon the point that the word "clear" would not suffice to relieve the annuitant. Then, again, Kay J. in *Gleadow* v. *Leetham* (2) deals with the word "clear." The gift was "the clear yearly sum free from all deductions and abatements whatsoever." Income tax not being a "deduction," but a payment which the legatee had to make herself, the learned judge had to consider whether the word "clear" would cover the

(1) 22 Ch. D. 182, 188, 192. (2) 22 Ch. D. 269, 273.

income tax, and he says: "If, however, income tax be not a deduction, but a payment which she has to make herself, not out of the annuity, but because she receives the annuity, I do not consider that the word 'clear' carries the matter any further."

In the face of those decisions, emphasized by the recent decision of Neville J. on very wide words in *In re Saillard* (1)—a decision which has since been affirmed by the Court of Appeal (2)—I should be shutting my eyes to authority were I to hold that the use of this word by itself is sufficient to entitle the annuitant to receive this annuity free of income tax. In this case there are other elements which negative the intention of the testator to give the annuity free of income tax. He has provided in terms for the legacy and succession duties in respect of various legacies and annuities given by his will, and at the time of his death there was something to which the expression "clear" was properly applicable, namely, the instalments of legacy duty payable in respect of this annuity. The word cannot therefore be said to be without meaning if it is held not to apply to income tax. There is also a further provision in the will by which authority is given to the trustees to appropriate and retain out of the capital of the share burdened with the annuity a sufficient sum to answer the annuity by the annual income thereof, and if this is done the share is thenceforth to be free of all obligations in respect of the annuity. Mr. Farrer has pointed out that the trustees could not safely make that appropriation if the annual sum to be provided for out of the income was not only the fixed sum payable to the annuitant, but the further sum which might at any time during her life represent the income tax payable in respect of that sum. It is quite impossible to predicate what that amount may be. At the date of the will of this testator very few persons would have anticipated that income tax at the rate of 25 per cent. in the pound would ever have become payable. For all these reasons I think that the contention of the widow cannot be maintained, and that this annuity is not payable to her free of income tax.

Solicitors: *Farrer & Co.; Young, Jackson, Beard & King.*

(1) [1917] 2 Ch. 140. (2) [1917] 2 Ch. 401.

G. M.

EVE J.
1917
Nov. 22.

In re MELLODY.
BRANDWOOD *v.* HADEN.

[1917 M. 977.]

Will—Charitable Use—Gift to provide an annual Treat or Field Day for the Schoolchildren of a particular Parish—Validity.

A testatrix bequeathed the income of a fund in trust to provide an annual treat or field day for the schoolchildren of Turton, or as many of such children as the same would provide for, the selection to rest with the vicar of St. Anne's Church, Turton, and the trustees of the fund. The income was not sufficient to provide a treat or field day for all the schoolchildren of Turton, who numbered about 600:—

Held, that the bequest was a good charitable gift on two grounds: (1.) as tending to the advancement of education by giving the children an opportunity of observing objects of the countryside and of nature about which they had been taught at school, and also by affording an incentive to regular attendance and industry in order to be selected as participants, and (2.) as being for purposes beneficial to a particular section of the community, namely, the schoolchildren resident or being educated at Turton.

ADJOURNED SUMMONS.

The testatrix, Priscilla Mellody, who died on January 1, 1917, appointed the plaintiffs executors and trustees of her will, and thereby gave and devised to them her two dwelling-houses and premises at Turton upon trust to sell the same, and, after payment of all incidental costs and expenses and the costs and expenses in connection with the preparation of any necessary trust deed to carry out that trust, to stand possessed of the residue of the moneys to arise from such sale, in trust to pay the same to the vicar and trustees for the time being of St. Anne's Church, Turton, to be held by them as next thereinafter provided; and the testatrix then desired and directed the vicar and trustees to invest the same and to stand possessed of the investments, upon trust as to one equal half part of the net income to arise therefrom to provide an annual treat or tea party for the aged poor people of Turton as therein mentioned, and as to the other equal half part of such income "to provide an annual treat or field day for the schoolchildren of Turton or as many of such children as the same will provide for"; and the

testatrix declared that the vicar and trustees and their successors should have full power to elect what persons should be entitled to participate in such treats respectively. The testatrix gave the residue of her estate to her trustees upon trust for the infant defendant Winifred Haden as and when she should attain the age of twenty-one years.

The trustees took out this summons for the determination of the question whether the gift in trust to provide an annual treat or field day for the schoolchildren of Turton was a valid charitable trust or whether it was void.

In the parish of Turton there were about 600 schoolchildren and three schools—namely, the St. Anne's Church of England School (attached to St. Anne's Church), the Edgworth Wesleyan School, and a public elementary school, all three maintained, but only the last-named provided, by the local education authority.

The income of the fund available for the treat or field day for the schoolchildren would not exceed 20*l.* per annum.

J. W. Manning, for the plaintiffs, stated the facts.

St. John Clerke, for the vicar of St. Anne's Church. The reference in the will to a trust deed explains why the trust is vested in the vicar and trustees. There are no trustees of St. Anne's Church.

This is a gift for the advancement of education. The income of the fund cannot exceed 20*l.* per annum, which will not be sufficient to give all the 600 children of St. Anne's parish a yearly treat, and there will have to be some selection from the total number. The gift is for the benefit of the schoolchildren and is therefore educational in character, and will tend to stimulate them in their studies in order to obtain a place on the selected list. It is in fact in the nature of a prize. Further, it is a gift for purposes beneficial to a section of the community, namely, all the schoolchildren. On both these grounds, it is a good charitable gift.

Austen-Cartmell, for the Attorney-General. The object of this gift forms part of a general system of education and stands on a similar footing to the gift for the building of fives courts which was held to be a good gift in *In re Mariette*. (1) It can be supported as

(1) [1915] 2 Ch. 284.

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a good gift on the ground that it is for the advancement of education. Moreover, it is also good as being a gift for general public purposes to be applied for the benefit of a particular section of the public. It is a trust for the benefit of the schoolchildren of Turton, who are a class of the community at large. They constitute a division of the public who answer that particular description. This is the converse case of *In re Drummond.* (1)

Fairfax Luxmoore, for the infant defendant. There is no condition restricting this gift to poor children, and there is no element of poverty upon which this gift can be supported as charitable: *In re Drummond.* (1) The gift in this case differs from that in *In re Mariette* (2), for there the gift was to a charitable institution in the first instance. This is not an original gift to a charity, and the treat is only to take place once a year. Whether the gift tends to the welfare of the children's bodies is a doubtful question and one upon which opinions may well differ. I submit that this gift cannot be supported as in any way tending to the advancement of education, nor is it good as being for purposes beneficial to a particular section of the community. This is simply a gift to provide amusement for the schoolchildren, and it might just as well have taken the form of a prize for cricket or any other pastime, and that would not have been a good charitable purpose: *In re Nottage.* (3) The principle of that case applies to this gift. I submit that this trust is not for a good charitable purpose and that the fund falls into residue.

EVE J. I think that this gift can be supported as a good charitable gift on two grounds—first, as tending to the advancement of education, and, secondly, as being for purposes beneficial to a particular section of the community. It is no doubt true that a school treat may not always be used only for educational purposes, but it does not necessarily follow that it partakes of the orgies of a juvenile beanfeast. It may well be made, and, I doubt not, often is made, the occasion for pointing out to the children those objects of the countryside and nature about which during their school hours they have read in their books, or which they have seen in the pictures displayed upon the walls of their schoolroom, but with which they can

(1) [1914] 2 Ch. 90. (2) [1915] 2 Ch. 284.
(3) [1895] 2 Ch. 649.

make no more intimate acquaintance in school. I think, also, that there was a good deal of force in Mr. St. John Clerke's argument that the possibility of being included in the list of those elected to participate in this annual treat would tend to encourage regularity in attendance at school and in the work and habits of the children and to promote industry and zeal in their studies. On these grounds I think that this can be supported as a gift tending to the advancement of education.

Further, I think that it is a gift for purposes beneficial to a section of the community. In the circumstances of the present devastating war children constitute a very important section of the community. This is a trust for the benefit of the schoolchildren of Turton—whether for children attending the school of any particular denomination I will not pretend to say; but it is a trust for the benefit of a large and important section of the public resident or being educated in Turton, and on that ground also it is in my opinion a good charitable gift.

The fund will be transferred to the Official Trustees of Charitable Funds and a scheme for its administration will have to be prepared.

Solicitors: *Woodcock Ryland & Parker, for Woodcock & Sons, Haslingden; Cole & Jackson, for Broadbent & Heelis, Bolton; The Treasury Solicitor.*

R. M.

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Nov. 15, 16, 26, 27, 28; Dec. 20.

COLLIS *v.* AMPHLETT.

[1915 C. 2878.]

Common — Regulation — Encroachment — Boundaries — Award Map — Admissibility and Conclusiveness—Estoppel—Hedge—Ditch-Width —Presumption of Ownership—Conservators' Right to Sue—Statute of Limitations—Commons Act, 1876 (39 & 40 *Vict. c.* 56), *s.* 36.

The conservators of a common regulated under the Commons Act, 1876, in whom the general management of the common was vested, brought an action to restrain the owner of enclosures abutting on the common from encroaching by means of fences erected on the common side of the hedges forming the boundary of the common as delineated upon a map annexed to the award. The defendant was a party to the application for regulation of the common, which was limited to "improvement," and did not extend to the "adjustment of rights." He contended that the award map was not conclusive and did not in fact show the real boundaries of the common. His enclosures were physically separated from the common by old quickset hedges, and the map showed as the boundary the centre line of these hedges. There was evidence that the universal rule and practice on the common was and had been where there was now no ditch or trace of one to allow a ditch-width to the owners of the enclosures in order to protect their hedges from injury by commonable animals and otherwise. The defendant contended that, either by presumption of law or by inference from the evidence, he was entitled to a ditch-width on the common side of the hedges, and that, allowing for this ditch-width, the fences complained of did not constitute any encroachment. He also contended that the conservators were not entitled to sue, and that the action was barred by the Statute of Limitations :—

Held by Younger J. and the Court of Appeal, that there was no presumption of law that the owner of a hedge was entitled to the ownership of a ditch-width beyond it where no ditch existed nor was proved to have ever existed; that, having regard to s. 36 of the Commons Act, 1876, the Statute of Limitations did not apply (Swinfen Eady L.J. expressing no opinion upon this point); and that the conservators had a right to sue. But

Held by Swinfen Eady and Warrington L.JJ. (Scrutton L.J. dissenting), that the award map was not conclusive as to boundaries and the defendant was not estopped from disputing its accuracy; that, on the evidence, apart from any question of legal presumption, the defendant's boundary was about four feet distant on the common side from the outer line of the growers of the hedges separating

his closes from the common; and that he was entitled to erect and maintain fences on or within his boundary so defined.

Decision of Younger J. on these points reversed.

Cook v. *Mitcham Common Conservators* [1901] 1 Ch. 387 and *Chislehurst Common Conservators* v. *Newton* [1901] 1 Ch. 389, n., distinguished.

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APPEAL from a decision of Younger J.

The action was brought by the plaintiff, who was clerk to the conservators of Clent Hill Common in the county of Worcester, on whose behalf he sued. The defendant was tenant for life or otherwise interested in sundry closes of land abutting upon the common. The plaintiff claimed a declaration that certain strips of land which he alleged had been enclosed by the defendant by fences erected upon the common side of the real boundary of his closes formed part of the common, and that the erection and maintenance by the defendant of those fences were wrongful and illegal acts. The plaintiff also asked for consequential relief by way of injunction and damages.

The defendant denied that he had encroached upon the common, and asserted that any claim in respect of the alleged encroachment was barred by the Statute of Limitations. He further said that in any case the conservators, whether by their clerk or otherwise, had no title to sue in respect of the alleged encroachment.

In 1880 the defendant, who had lived in close proximity to the common for the past fifty years, and was much interested in its preservation, promoted an application to the Inclosure Commissioners for its regulation under the Commons Act, 1876. The application asked for "the improvement" of the common as described in s. 5 of the Act, and did not extend to "the adjustment of rights" under s. 4, which expression includes, under sub-s. 5 of that section, "the determination of any rights and settlement of any disputes relating to boundaries." At the time of the application there were not any boundaries in dispute. The application, as required by the procedure under the Act, was accompanied by a map defining the lands proposed to be dealt with. This map was prepared on the instructions of the defendant by a Mr. Taylor, a land surveyor of Stourbridge. After the usual local inquiry had been held a report, to which was annexed a map of the common, was made by Mr. Pemberton Leach, as assistant Commissioner. A

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Provisional Order for the regulation of the common was then made by the Inclosure Commissioners in pursuance of the Inclosure Acts, 1845 to 1868, and by the Regulation (Clent) Provisional Order Confirmation Act, 1880, that Order was duly confirmed. To that Provisional Order a map of the common was annexed.

On April 13, 1881, Mr. Taylor, who had been appointed as valuer, made his award, which on the next day was confirmed by the Inclosure Commissioners. To the award was annexed a map, and it was therein stated that the common was thereon delineated, by an edging of green colour, and it was thereby declared that in pursuance of the said Provisional Order there was reserved "for the benefit of the inhabitants of the several parishes of Clent, Hagley and Halesowen, and of the several towns of Stourbridge, Dudley, Rowley Regis, Brierley Hill, Quarry Bank and Kidderminster, and of the public generally, at all times a privilege of walking and playing games and enjoying other species of recreation over the whole of the said common subject to such bye-laws as are hereinafter mentioned." The award further declared "That for the improvement of the said common the general management thereof shall be and is hereby vested in a body of twelve conservators," of whom the defendant was one of the first. He was elected as chairman at the first meeting of the conservators in 1881 and filled that office until November, 1902, when he resigned. The conservators were empowered to execute any works for maintaining, improving, or adding to the beauty of the common as they might from time to time deem necessary or proper; to make by-laws and regulations for the protection, &c., of the common, such by-laws and regulations being subject to confirmation by a Secretary of State as provided by the Acts; and the conservators might sue or be sued in the name of their clerk.

By-laws were duly made and confirmed, and by an interpretation clause the word "common" was defined as meaning the Clent Hill Common as the same was delineated on a plan deposited with the clerk of the peace of the county of Worcester, such plan being in fact a tracing of that annexed to the application, the Provisional Order, and the award. Sect. 2 of the by-laws provided that it should be unlawful to do or commit or cause to be done or committed (inter alia) "any trespass or encroachment upon, or enclosing any part of

the common." By s. 3 it was provided that "any person doing or committing, or causing to be done or committed any of the acts or things above mentioned, shall be guilty of an offence, and shall, on conviction, be liable for each offence to a penalty not exceeding 40*s*."

At the trial some confusion arose as to the different maps or plans referred to respectively in the application, the report of the assistant Commissioner, the Provisional Order, and the award. According to the plaintiff they were one and the same plan, but, as is pointed out by Swinfen Eady L.J. in his judgment, they differed in certain particulars. Mr. Taylor's original map appeared to have been lost, and neither the assistant Commissioner's report nor the accompanying map was produced, privilege being claimed for them by the Board of Agriculture. Mr. Taylor was dead, but one of his assistants, a Mr. Perry, who made part of the survey on which the map was based, was called as a witness. The award map defined the boundaries of the common by a green-coloured border edged by a black line. Along the boundary line as shown on the map sundry T marks were placed on the enclosure side of the boundary, and these were used, according to the evidence of Mr. Perry, to indicate that those fences belonged to the owners of the enclosures. He stated that in measuring for the black line, in places where the fence was a hedge, the measurement was taken to the centre line of the growers ; in case of any post and rail or other permanent fence the measurement was taken to the face of the fence. In any case, where there was a hedge with a permanent fence in front of it the measurement was taken to that fence. The award map showed that the physical boundary between the common and each of the defendant's enclosures was a hedge, which, as the T marks indicated, belonged to the owner of the enclosures. Since 1881 the defendant had erected on the common side of his hedges at a distance of about four feet from them certain iron or post and wire fences, which were complained of in this action as encroachments, but which he justified on the ground that he and the owners of all enclosures abutting on the common were entitled, where the physical boundary was a quickset hedge, to a ditch width of about four feet on the common side of the hedge, whether there was in fact any ditch or not. In support of this view the defendant adduced evidence to show that

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the owner of a quickset hedge, the boundary between two fields, was always entitled to claim three or four feet on the other side of it ditch or no ditch, this being necessary for the protection of the hedge, which could not exist without it. The T marks on the plans meant that the owner of the hedge was the owner of the growers and of a ditch width beyond it. This was a rule which was universally recognized on Clent Hill Common. It was a permanent right of protection whether exercised or dormant. There was evidence, on the other hand, that the T marks on the map only indicated that the hedge belonged to the owner of the land on the side on which the T was shown.

Younger J. held that the award map was admissible in evidence on the question of boundaries, and was conclusive of the limit and extent of the common at the date of the award : *Chislehurst Common Conservators* v. *Newton* (1) ; *Cook* v. *Mitcham Common Conservators* (2) ; that there was no presumption of law that the owner of a hedge was entitled to the ownership of a " ditch-width " of four or any other number of feet on the further side where no ditch existed, nor was proved to have ever existed ; that, having regard to the Commons Act, 1876, s. 36, the Statute of Limitations was not applicable ; that the conservators had the right to sue : *Attorney-General* v. *Amhurst* (3) ; *Louth District Council* v. *West* (4) ; and that on the evidence they were entitled to the declaration asked.

From this judgment the defendant appealed.

The Appellant in person. It is submitted, first, that the conservators have no right to sue. By the award their powers are strictly limited to carrying out the purpose of " improvement " as specified in s. 5 of the Commons Act, 1876. The application to the Inclosure Commissioners was for " improvement " only, and the statute, therefore, under which the conservators are constituted, gives them no power to sue in an action for trespass. No question of " the adjustment of rights " was ever involved in the proceedings for regulation. The learned judge was wrong, therefore, in holding that the rights of adjoining owners came into the proceedings taken under

(1) [1901] 1 Ch. 389, n.
(2) [1901] 1 Ch. 387.
(3) (1879) 23 Sol. J. 443.
(4) (1896) 65 L. J. (Q.B.) 535.

s. 5, and that the adjoining owners were bound for all time by a map produced in the course of those proceedings. The conservators being creatures of statute have no more power than is given them by the Act. It is true that the award provides that the conservators can sue or be sued in the name of their clerk, but that power is limited to taking such action as may be necessary to carry into effect the by-laws which they are entrusted to administer, or to defend themselves against actions brought against them. The limit of their statutory power to enforce the by-laws is to take proceedings for the recovery of the prescribed penalty for offences. It cannot rightly be said that the expression "general management" in s. 5, sub-s. 4, implies the duty of maintaining boundaries or authorizes an action for trespass. On this point Younger J. relied on *Louth District Council* v. *West* (1) and *Attorney-General* v. *Amhurst* (2), but those cases are not applicable here.

The next submission is that Younger J. was wrong in holding that the plan annexed to the award was conclusive as to the boundaries of the common. He relied upon *Cook* v. *Mitcham Common Conservators* (3) and *Chislehurst Common Conservators* v. *Newton* (4); but these were cases under the Metropolitan Commons Acts, 1866 and 1869, and have no application to the present case: see s. 35 of the Commons Act, 1876, whereby it is conversely enacted that the Act of 1876 shall not apply to any metropolitan common within the meaning of the Acts of 1866 and 1869. In the Act of 1866 there is no mention of any map at all. The plan in this case was prepared with no reference to the adjustment of rights and only to show an area over which the by-laws were to run, whereas the maps in the other cases showed boundaries which the conservators were empowered to maintain.

As to the Statute of Limitations, it is admitted that, in the face of s. 36 of the Act of 1876, that defence cannot be maintained except with regard to fences erected before the date of the award. On the evidence it is submitted that no encroachment has been proved. The black line on the award map indicates the centre line of growers of the old hedges forming the physical boundary between the common and the enclosures abutting upon it. The T marks are intended

(1) 65 L. J. (Q.B.) 535.
(2) 23 Sol. J. 443.
(3) [1901] 1 Ch. 387.
(4) [1901] 1 Ch. 389, n.

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to show that there is a hedge which belongs to the owner on that side of the line where the T is placed, and that such owner is entitled to a ditch-width of about four feet from the hedge on the common side : see Usill's " Practical Surveying," 11th ed., p. 13.

The submission is that there is a general rule, if not a local custom, applying to Clent that the owners of enclosures abutting on the common are entitled, for the protection of their boundary hedges, to a four-feet ditch width on the common side of the hedge. Such a custom is clearly reasonable having regard to the fact that no living hedge could be maintained without outside protection against commonable animals. On the evidence such a custom applies to the whole district over which it is alleged to exist. Further, it has existed from time immemorial. The living fences originally planted by the grantees of the enclosures and physically separating the enclosures from the common could never have existed without some such protection on the common side. A hedge could not be grown in such a position without the protection of some kind of fence at a proper distance from the growers. It is clear, therefore, that the old hedges were planted, sometimes on natural banks and sometimes on artificial banks, at such a distance from the actual boundary of the common as to permit of a fence of some kind to protect the hedges while growing, and this is probably the origin of the general rule, which undoubtedly prevails in the district, of allowing to the owners of enclosures a ditch-width on the common side of the hedge.

C. J. Mathew, K.C., and *W. Copping* (for *C. A. Bennett*, serving with His Majesty's Forces), for the respondents. Younger J. has rightly held that the award map is conclusive as to the boundaries of the common. The appellant is estopped from disputing it. At the date of the award all parties must be deemed to have agreed to take the centre of the growers as the boundary line. Sect. 105 of the Inclosure Act, 1845, provides that when the award has been approved it is final and conclusive and binding on all parties.

[SCRUTTON L.J. You are putting it too widely. Collins J. in *Jacomb* v. *Turner* (1) held that it was not binding as to the title of the allottee in that case.]

There is no question of title in this case. The conservators do not claim any title in the soil ; the question is as to the extent of the

(1) [1892] 1 Q. B. 47.

area over which they are given certain rights. It is the fact that the boundaries were agreed upon; that makes the Act of 1876 applicable. If the boundaries are not defined, how can the conservators regulate the common? They cannot prevent petty encroachments unless the limits of the area are defined. The award map is conclusive and binding on the appellant: *Cook* v. *Mitcham Common Conservators* (1); *Chislehurst Common Conservators* v. *Newton*. (2)

As to the presumption of the right to a ditch-width, there is no such presumption except where an artificial ditch exists or can be shown to have existed. The Courts have never recognized such a presumption as is contended for by the appellant. The most that has been recognized is the presumption that where there is a hedge and a ditch adjoining the ditch belongs to the owner of the hedge. It cannot be successfully contended that wherever grazing land is bounded by a quickset hedge there is a presumption that the owner of the hedge is entitled to a ditch-width for its protection. The presumption as to the ditch belonging to the owner of the hedge is not so strong where it forms the physical boundary of a common. The presumption in that case is that the maker of a ditch would not throw the soil upon his own land, but on the common. There is here no evidence of any local custom as to the four-feet ditch-width. *Vowles* v. *Miller* (3) was the foundation of the presumption that where there is a hedge and ditch the ditch belongs to the owner of the hedge; but there Lawrence J. rejected the rule, alleged by the defendant, that he was entitled to four feet width for his bank and four feet for his ditch. *Henniker* v. *Howard* (4) shows that the presumption will not be lightly set aside, but the existence of a ditch must be clearly proved. There is no presumption that a ditch belongs to the owner of the adjacent hedge when the ditch is not artificial: *Marshall* v. *Taylor*. (5)

[SWINFEN EADY L.J. referred to *Earl of Craven* v. *Pridmore*. (6)]

As to the right of the conservators to sue, they have that right under the award. Moreover, where a public body is entrusted with the management of a common it is a strong thing to say that there is no right in them to sue for trespass in the case of an encroachment.

(1) [1901] 1 Ch. 387.
(2) [1901] 1 Ch. 389, n.
(3) (1810) 3 Taunt. 137.
(4) (1904) 90 L. T. 157.
(5) [1895] 1 Ch. 641.
(6) (1902) 18 Times L. R. 282.

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In the *Chislehurst Case* (1) the conservators did in fact sue. See also *Lee Conservancy Board* v. *Button* (2), which went to the House of Lords and was affirmed sub nom. *River Lee Navigation Conservators* v. *Button* (3), and *Morley* v. *Clifford.* (4)

If, as we contend, the award map is conclusive against the defendant, the question as to the right to a ditch-width is immaterial. It is submitted that the judgment appealed against is right both as to the conclusiveness of the map and as to the absence of any such presumption as is relied upon by the appellant.

The Appellant in reply. The presumption has been often recognized: *Earl of Craven* v. *Pridmore* (5); *Vowles* v. *Miller* (6); *Noye* v. *Reed.* (7)

[SWINFEN EADY L.J. Is there any case earlier than *Vowles* v. *Miller* (6) in which the existence of the presumption is dealt with?]

Guy v. *West.* (8)

[SWINFEN EADY L.J. referred to *Simcox* v. *Yardley Rural Council.* (9)]

Apart from legal recognition the custom is universal throughout the country.

[SWINFEN EADY L.J. The question is whether there is any evidence of local custom.]

As to the right of the conservators to sue, they have none apart from the special provisions of the Act, under which their remedy is limited to the recovery of penalties.

Cur. adv. vult.

Dec. 20. SWINFEN EADY L.J., after stating the facts leading up to the application for the regulation of the common, continued: An assistant Commissioner held a local inquiry and made a report. By s. 11, sub-s. 8, the report is to be accompanied by "an outline or other map." Neither his report nor this map was produced, privilege being claimed for them by the Board of Agriculture. The practice of Government departments in claiming privilege for reports made

(1) [1901] 1 Ch. 389, n.
(2) (1879) 12 Ch. D. 383.
(3) (1881) 6 App. Cas. 685.
(4) (1882) 51 L. J. (Ch.) 687.
(5) 18 Times L. R. 282.
(6) 3 Taunt. 137.
(7) (1827) 1 Man. & Ry. 63.
(8) (1808) 2 Selw. N. P. 13th ed. 1244.
(9) (1905) 69 J. P. 66.

by inspectors or other officers on their behalf after holding local inquiries before Government action is taken altogether destroys the value of such inquiries as constituting any security for the subject against arbitrary action on the part of the Government.

The Provisional Order followed the application, and the original has been produced with the map stated to have been annexed to it. This is just an outline or sketch map, but differs from the award map, to be presently mentioned, in marking only a few of the boundary fences with a T mark.

The Provisional Order was confirmed by statute, and thereupon the provisions of s. 13 of the Commons Act, 1876, came into force, and the provisions of the Inclosure Acts, 1845 to 1868, as amended by the Commons Act, 1876, became applicable.

Accordingly an award was made by a valuer and a map of the common was annexed to his award. No dispute about boundaries had then arisen, and the valuer had not any jurisdiction to determine it if it had.

Nevertheless, it has been held by the judge that the award map is conclusive as to the boundaries of the common and shows that at the points complained of (except as to close 97) the defendant has encroached. In my opinion the map does not in fact show or establish any encroachment by the defendant; but even if it did show an encroachment, why is it conclusive? It was no part of the valuer's duty to adjust any boundaries, nor had he any authority to do so. The learned judge considered that the present case was indistinguishable from *Cook* v. *Mitcham Common Conservators* (1) and *Chislehurst Common Conservators* v. *Newton*. (2) Both those cases, however, were decisions under the Metropolitan Commons Act, 1866, and have no application to the present case.

A scheme under that Act, when subsequently confirmed by Act of Parliament, is conclusive, and to prevent any injustice it is provided by the Act that compensation shall be made for any estate right or interest taken away or injuriously affected by any scheme; and also that any person dissatisfied with any determination made or implied by the Commissioners may obtain a decision in an action at law under the Inclosure Act, 1845. There is nothing analogous to this in the procedure by which this common is regulated.

(1) [1901] 1 Ch. 387. (2) [1901] 1 Ch. 389, n.

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It was further urged that the map was conclusive by reason of s. 105 of the Inclosure Act, 1845. It was held, however, in *Jacomb* v. *Turner* (1) that s. 105 must be read with s. 49, and that "conclusive" in s. 105 did not mean conclusive as to matters which the valuer and Commissioners had no jurisdiction to determine. The same reasoning is applicable to the present case, as the valuer had no jurisdiction to settle any question of title or boundaries; and, moreover, if his award be read carefully it will be seen that he did not purport to do so.

It was also urged that there was some personal estoppel against the defendant Amphlett which prevented his disputing the accuracy of any boundaries, if in fact they were shown on the award map. This argument appeared to rest on the defendant having been a party to the original application to the Commissioners, which was accompanied by a map, which map the Government department has lost or mislaid and the contents of which we do not know. Why that should estop him from disputing the accuracy of a map made at a later stage of the proceedings, and not identical with any earlier map produced, I cannot follow.

It is necessary now to consider what encroachments the defendant is in fact alleged to have made.

In the spring of the year 1913 the conservators, or some of them, appear to have formed the idea that the boundaries of the common were in every case the centre line of the "old growers" of the hedges round the common—that is to say, the centre line of the old hedges protecting the old inclosures bordering on the common. Whether or not this line is the real boundary of the common is the substantial dispute in the action. Most of these hedges were very old, and some were widespreading at the date of the award; and upon the map annexed to the award of the valuer setting out the common it is most clearly shown that the whole of these hedges belonged to the owners of old inclosures adjoining the common, and not that half only of the hedges belonged to them, as would have been the case if their boundary were the centre line of the hedge.

Nevertheless, on May 5, 1913, the conservators resolved on appointing Mr. H. E. Foulkes, surveyor of Stourbridge, "to check the

(1) [1892] 1 Q. B. 47.

boundaries shown on the map attached to the award, with the actual boundaries of the common on the ground, and ascertain if the boundaries of the common are the old growers in the hedges round the common."

The conservators then complained of eleven persons having property bordering on the common encroaching by having fences on the common side of the centre line of the old growers, and selected Mr. Amphlett as the principal landowner to be defendant in the proceedings to try their right, the other cases standing over to abide the result of the present action.

After the passing of the statute confirming the Provisional Order John Taylor, of Stourbridge, land surveyor, was appointed valuer, and he made his award on April 13, 1881, confirmed by the Inclosure Commissioners the next day. There is annexed to the award an outline map, on which the common is delineated by an edging of green colour. By the award there is reserved for the benefit of the public generally at all times a privilege of walking and playing games and enjoying other species of recreation over the whole of the common.

The acreage of the common is not mentioned in the award, or stated on the map annexed to it.

Mr. Taylor, the valuer, is long since dead, and Christopher Oates, a surveyor who assisted him in making the survey of the common, is also dead ; but the plaintiffs were able to call Mr. William Perry, who in November, 1879, when the survey was made, was a young man in Mr. Taylor's office, and assisted Mr. Oates with regard to some portions of the common.

Mr. Perry said that in making his measurements where there was a hedge they measured to the centre line of the growers ; where there were posts and rails of a permanent character they measured to the face on the common side of the post and rails ; where there were posts and pales they did the same ; where there was a wall or permanent iron fencing they measured to the wall or fencing. The plan annexed to the award is on too small a scale and without sufficient detail to show what kind of fence constituted the actual boundary of the old inclosures in 1879 or 1881 at the various points in dispute in this action ; indeed, all round the common no distinction is made on the award map visible to the naked eye in any different kind of boundary,

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except that at Hagley, at a place not in dispute, a wall is shown by double lines and a park paling by a dotted line in the manner customarily adopted by surveyors. On the rest of the boundary delineated on the award map it does not appear whether at any given point it was a post and rail fence, or a growing hedge, or a permanent iron fence, or a post and wire fence, or an old pit rope fence, which there certainly was in some places. Some confusion arose at the trial by referring to various maps as if they were identical and copies of each other. On an examination by us they were found to differ considerably, and I therefore refer to the original map physically annexed to the parchment award and signed by Mr. James Caird and Mr. Leach.

It will be observed that on this map, which is the original, all the fences are marked T within the boundary of the old inclosures. Outside the green verge, which is intended to mark the external boundaries of the common, there is a strong black line, and all the T marks are on this line. Indeed, the all-important fact that the whole hedge or other boundary fence, whatever it was, and not merely one half up to the centre, belonged to the owners of the inclosures at the date of the award is not in dispute. They are clearly so shown on the award map itself. Mr. Perry frankly admitted it. According to his evidence on this plan T marks were placed right round the boundaries to show that the fences belonged to the old inclosures, whether the fence was a hedge, or post and rails, or post and pales, or iron. The hedges were very old rough, straggling ones, and in places had not been cut back for many years, if ever.

The evidence establishes that in the neighbourhood of this common the hedges inclosing land have been usually planted on a bank, sometimes on a bank which appeared to be a natural bank, if there was one available, otherwise upon an artificial bank made in the usual way. It is common knowledge that thorn hedges are almost universally planted in the form of the figure 5 on dice (⁘) with three lines of growers—an outer, a middle, and an inner line. There was distinct evidence, upon which the judge acted, that at some of the points in dispute the banks on which the hedges were planted were artificial, made by excavating a ditch. [The Lord

Justice then referred to one of the defendant's closes numbered 97 on the ordnance map, as to which Younger J. held there had been no encroachment, and continued :]

In answer to the plaintiffs' allegations that the defendant's fences encroach upon the common the defendant raises one general and important point applicable to all the instances alleged against him, except where his men have without his instructions inadvertently placed a part of his fence beyond the boundary which he claims. In these places he is willing, and offered, to put back his fence. He claims no right to encroach at any point by a give-and-take line.

With regard to his main contention, he insists that when the several parts of the common now inclosed were granted by the lord of the manor with the consent of the homage to be held by copy, the grantee had to make and protect the inclosure ; that a newly-planted hedge alone (without protection) would have been quite useless against the animals which the commoners turned out upon the common. The minutes of the conservators refer to complaints made to them about an excessive number of animals turned out to graze, and their efforts to secure that only commoners having common rights should turn out, and they only such limited number as law and custom allowed. The defendant contends that there must always have been, what is seen to-day in many places, a fence outside the hedge to protect it and at a sufficient distance from the hedge to prevent the hedge being destroyed by cattle grazing. Sometimes a ditch would be dug and the earth thrown up to form the bank, on which the hedge would be planted. Sometimes the hedge would be planted on an existing bank, if there was already one there, in a position available for the purpose, and then a fence would be erected outside it to protect its growth ; according to the nature of the bank, this fence would be lower down its slope or at the foot of it, as the case might be.

A quick hedge, when first planted, requires protection against cattle. If an actual ditch be made and the soil thrown up and the hedge planted upon it, there is a presumption, which has been frequently acted upon, that to the outside verge of the ditch the land belongs to the owner of the hedge and bank. The defendant gave evidence that the universal rule and practice on this common is and has been, where there is now no ditch or even trace of a ditch, to

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allow a ditch-width to the owners of the inclosure in order to protect their hedges, this practice arising doubtless from the fact that when the hedge was first planted there was a fence to protect it about a ditch-width away. This ditch-width so claimed is about four feet, varying slightly with the contour and physical condition of the ground. Defendant's evidence was that all the owners, large and small, had adopted the same line. Lord Cobham is lord of the manor, and his park palings are well outside the line of the old growers. At another place, shown in defendant's photograph No. 1, Lord Cobham's stout post and rail fence is at the bottom of the bank and about four feet from the line of growers. In 1894, when Mr. Matthews made a survey of the common and reported several encroachments, it was assumed throughout that the ditch width allowance was four feet, and that line was taken all round the common from the growers, and nothing was reported or treated as an encroachment unless it was outside this four feet. This was defendant's clear evidence, and he was not cross-examined about it.

The defendant's evidence—and he referred to the minutes of the conservators on the subject—was that Mr. Matthews was instructed in 1894 to obtain particulars of all encroachments on the common since the date of the award, and that at that time there were fences of the defendant standing at various places, which have since decayed and been replaced by other fences in the same position, and these are now complained of in this action; but no suggestion was then made that these were encroachments. Other persons having land abutting on the common were in a similar position.

The defendant's long and intimate knowledge of the common appears to be more extensive than that of any other person now living, and he deposed that he had always heard and understood that four feet was the recognized ditch-width on Clent Hill Common and throughout the manorial common extending to the land abutting on the Walton Hill side of the common. He said it was the line adopted by all the frontagers, large and small. There must always have been a right to protect the hedge against the pressure of the commoners' cattle. Defendant did not say that the four-feet ditch-width applies anywhere else than to Clent Hill Common, of which he had extensive knowledge. He has lived in the same house at Clent for nearly fifty years, and with regard to the defendant and the

two surveyors whom he called, the judge said that the bona fides of all three was entirely beyond question.

In my opinion the defendant's evidence establishes that throughout the boundaries of Clent Hill Common a ditch-width of about four feet from the hedge, that is, from the outer line of growers, has always been allowed and recognized, and that the proper inference of fact to draw is that the legal boundaries of the inclosures surrounding the common are four feet outside the outer line of growers. The fact that at some points there is not now any ditch forming a water-course is not material. The defendant's evidence was that on this common the surface of the ditches was constantly subject to denudation, and all traces of any original trench or ditch would disappear except in a few cases where denudations do not apply. The defendant was also able to give instances where he could speak positively to the existence of an earlier fence worn out and perished and replaced by what is now alleged to be an encroachment.

A similar result is arrived at in another way. All the boundary fences, including growing hedges, belonged at the date of the award to the old inclosures. The old hedges were high, wide, and straggling, and from their size and character as shown in the photographs must have usually projected fully four feet on the common side as well as on the inclosure side from the centre line. Certainly it would be ridiculous to suggest that when the award provides for public rights of walking, games, and recreation over the whole of the common "delineated by an edging of green colour" this right was to be enjoyed in the thickness of the hedges over the outer line of growers and to the centre line of the hedge.

Assuming, as I do, that Mr. Taylor's assistants when surveying in 1879 measured to the centre line of hedges where there was no fence outside them, and whether there was a ditch there or not, this would be in conformity with the practice of the ordnance surveyors also. Their survey shows the physical condition of the country which they are mapping out. It does not, however, follow from a map being so made that the hedge belongs in equal moieties to the adjoining owners. In the present case the contrary is actually indicated on the face of the award map by the T marks.

The defendant pleaded the further defence of the Statute of Limitations, but the judge held that such plea was of no avail having

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regard to s. 36 of the Commons Act, 1876. Upon the hearing before us the defendant did not argue the question of the statute, so I express no opinion upon it; as he succeeds on other grounds it is not necessary to do so.

It was contended that the conservators were not entitled to sue in respect of encroachments, but, having regard to their statutory duty of preventing encroachments, this point fails.

I am of opinion that the appeal should be allowed and the judgment of Younger J. discharged except so far as it decided that defendant had not encroached on the common at close 97. Declare that defendant's boundary where his land adjoins the common is about four feet distant on the common side from the outer line of growers of the hedges separating his inclosures from the common, and that he is entitled to erect and maintain fences on or within his boundary as above defined.

The defendant undertaking to put back any fence of his own standing beyond his boundary as hereby defined, liberty to apply in the event of any dispute between plaintiffs and defendant as to any particular fence or portion of fence.

WARRINGTON L.J. The plaintiff is the clerk and sues on behalf of the conservators of Clent Hill Common in the county of Worcester. The defendant is the owner or tenant for life or in fee simple of certain old inclosures abutting on the common. The conservators complain that the defendant has encroached on the common by the erection of certain fences outside his inclosures which they say are bounded by hedges admittedly belonging to him. The defendant contends that the fences generally are on his land, the boundary of which, as he maintains, is a sufficient distance outside the hedges to justify the erection of the fences. He admits that in a few places he may have by accident placed a part of his fence too far forward, and wherever this is found to be the case he claims no right so to maintain the fences and is willing to set them back. Younger J. has held that except those round one close (No. 97) the fences constitute an encroachment and has given the plaintiffs consequential relief. The defendant appeals.

Clent Hill Common is part of a larger tract forming a manorial common, Lord Cobham being the lord of the manor. It is now

subject to regulations made under the provisions of the Commons Act, 1876. The conservators contend that, as the result of the proceedings under that Act, the whole of the land up to the hedges above referred to is finally and conclusively determined to be included in the common; it is therefore necessary carefully to examine the provisions of the Act.

The Act provides for two separate and alternative modes of dealing with a common—first regulation, and secondly inclosure. The mode adopted in the present case was regulation only. Again, "regulation" may have for its object the adjustment of rights in respect of the common and the improvement of the common or either of such objects, and "adjustment of rights" comprises, amongst other things, the settlement of any disputes relating to boundaries. On the other hand "improvement of the common" comprises only the things specified in s. 5, the settlement of disputes as to boundaries not being one of these things.

In the present case the application on which the subsequent proceedings were founded was for improvement only, and it was expressly stated that no adjustment of rights was required and that there were no disputes as to boundaries. The defendant was one of those who signed the application. As required by the Act, a map of the common accompanied the application, but that map has not been produced.

Pursuant to the Act a local inquiry was held by an assistant Commissioner, who in due course made his report accompanied by a map. This map has not been produced, the Board of Agriculture having claimed privilege for it.

On February 13, 1880, the Commissioners made a Provisional Order for the improvement of the common and annexed thereto a copy of the map annexed to the report of the assistant Commissioner. This map has been produced. It is a mere sketch. The common is surrounded by a green verge line on the outer edge of which is a thin black line, intended, apparently, to represent the actual boundary of the common. There are a few, but very few, T marks placed on the side furthest from the common of the thin black line, thus indicating that the physical boundary at those places is the property of the owner of the adjoining land and is not part of the common. The map contains no indication of the nature of the

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physical boundary, and does not specify the names of the adjoining owners.

The Provisional Order directed that for the improvement of the common certain provisions should be put in force, including the making of by-laws and regulations for the prevention of and protection from nuisance, and for keeping order on the common and the general management of the common. It also provided for the reservation to the inhabitants of certain parishes and to the public generally of the privilege of recreation over the common subject to by-laws and regulations.

On August 2, 1880, an Act was passed confirming the Provisional Order. Thereupon s. 13 of the Act of 1876 came into operation, which provides that the subsequent proceedings for carrying into effect the regulation of the common shall be the same, so far as is practicable, as they would be in case such common were to be inclosed instead of regulated, and the provisions of the Inclosure Acts, 1845 to 1868, as amended by the Act of 1876 shall apply accordingly.

In due course a Mr. John Taylor, a surveyor of Worcester, was appointed the valuer for the purposes of the Acts, and after taking the appropriate proceedings as required by the Inclosure Acts he made his award on April 13, 1881, and annexed thereto a map of the common. The operative part of the award is confined entirely to the matters mentioned in s. 5 of the Act of 1876 and the reservation of the right of recreation above referred to, and quite properly deals in no way with the question of boundaries except by stating that on the map the common is delineated by an edging of green colour.

The map is on a scale of three chains to an inch. It indicates the boundary of the common by a thin black line with the green edging within it. It has numerous T marks, always on the side furthest from the common of the thin black line, indicating that the physical obstruction constituting the boundary is the property of the owner of the close in which the mark is placed, and it gives the names of the owners of such closes, but it does not indicate the nature of the boundary, except that in some places there are marks on some of the closes indicating that there are trees growing thereon.

Mr. Taylor is dead. [The Lord Justice then referred to the evi-

dence of Mr. Perry, and continued :] The conservators rely on s. 105 of the Act of 1845, which provides that, after the confirmation of the award, every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever. There are, as it seems to me, two complete answers to this contention. First, that if the award purported to settle and determine as between the common and the adjoining owners the precise boundaries of their lands where they adjoin the common the award was made without jurisdiction, the duties of the valuer under the Act of 1876, having regard to the terms of the application and the Provisional Order, being confined to matters comprised within the expression " improvement of the common."

The case is distinguishable in this respect from the *Mitcham Common Case* (1), before Farwell J., and the *Chislehurst Common Case* (2), before Chitty J. The scheme in those cases had been made under the Metropolitan Commons Act, 1866, which expressly provides for the settlement by a scheme under the Act of rights in, over, or affecting a common and gives the parties interested the right of disputing claims made on behalf of the commoners and for compensation for rights affected. I think it was thought sufficient in such a case as the present to indicate generally the extent and boundaries of the common, leaving the precise situation of such boundaries to be determined in the proper way if any question should arise as to them.

But, secondly, the map does not purport to show the precise boundary. It merely indicates that there is something separating the close from the common, and that something is the property of the owner of the close. What may from this be inferred in fact or result in law is in my opinion left open. I think, therefore, we are entitled, notwithstanding the award, to inquire into and to determine the actual boundaries of the adjoining closes and the common respectively. It is necessary for this purpose to state some further facts.

The common is part of the waste of the manor and is subject to rights of common. It is under this head—namely, as " land subject to rights of common," that it became subject to inclosure under the

(1) [1901] 1 Ch. 387. (2) [1901] 1 Ch. 389, n.

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Inclosure Acts (see Inclosure Act, 1845, s. 11) and to regulation and improvement under the Act of 1876.

The land is grass land. It is subject to common of pasture, and cattle have been depastured there in considerable numbers. The inclosures bordering on the common were therefore made against land on which cattle were or might be roaming at large, and in order to be effectual the barrier between the common and the inclosure must have been of such a nature as to oppose an obstacle to the passage of cattle or it would have been useless. Putting aside for the moment the fences in question, the only visible barrier (if in some cases and in its present condition it can be called such) is a line of growing trees or bushes, in some cases standing on a bank, in others on a slope. In general the trees or bushes form what one may call a rough hedge, but in one case at least it would appear to be merely the outer edge of a plantation occupying the adjoining close. Now a barrier of trees or bushes, whether in the form of a hedge or of a plantation, does not grow in a day or night, and the trees or bushes not only for many years would present no obstacle to an animal minded to wander from the common, but unless protected would be constantly liable to destruction.

I think one must infer from the facts just stated that the original medium of inclosure was a fence sufficiently strong to present an effectual barrier to the wandering propensity of cattle, and that the hedge or plantation was planted at a sufficient distance from such fence to avoid its destruction by cattle browsing on its leaves or twigs. It appears by the evidence that a space between hedge and fence of roughly four feet is usually regarded as sufficient.

I think I am justified in finding in the present case, not as the result of any presumption, but as a fair inference of fact from the evidence, that the true boundary of the defendant's closes is not the line of the present hedges or the edge of the existing plantation, but a line four feet therefrom on the outer side thereof. This view is confirmed by the fact that in other parts of the common, notably where it abuts on the north on Hagley Park, the hedges or plantations are protected by an external fence.

There is also evidence of a general practice in this locality to protect the growing hedges either by a ditch or by a fence outside the hedge; it is this that explains the idea of Mr. Amphlett that he

is entitled to what he calls a " ditch-width," and goes a long way to confirm the correctness of the inferences I propose to draw.

If I am right in the conclusion I have come to as to the true boundary of the defendant's closes, then there is no evidence of any acts of ownership on the part of the lord of the manor or of any other circumstance which would destroy the title of the defendant or retransfer to the common land originally inclosed from it.

In my opinion, therefore, the defendant's fences are not encroachments on the common except so far as they are outside the line I have mentioned ; if and so far as they are found to be outside the defendant has expressed his readiness to set them back, and I have no doubt he would have done so if requested by the conservators, provided they had not altogether denied his right to maintain the fences.

The defendant sought to arrive at the same result by insisting, as I have mentioned above, on the supposed existence of a presumption that the owner of a hedge is entitled to a strip of land outside it which he called a " ditch-width."

This suggested presumption would be an amplification of the well known one that where you find a hedge and ditch separating two properties the boundary is the edge of the ditch furthest from the hedge. That there might be such an amplification as the result of local custom may be conceded ; but in my opinion there is no evidence in this case of local custom, that as to the practice above referred to not being sufficient for this purpose. There is no authority for any such amplified presumption in the absence of custom. In my opinion it cannot properly be held that it exists.

As to that arising from the existence of a hedge and ditch, I am unable to say as a certainty that on the site of any of the alleged encroachments there was a ditch such as would give rise to the presumption, namely, an artificial ditch dug at the limit of the close, the earth therefrom going to make the bank on which the hedge is planted : see *Marshall* v. *Taylor*. (1)

On the whole, if the defendant is to succeed, as I think he ought, it must in my opinion be on the facts of the case and the inferences to be drawn from them, unassisted by any presumption.

The defendant has pleaded the Statute of Limitations, but

(1) [1895] 1 Ch. 641.

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admitted in the course of his argument that, as to any encroachment made since the passing of the Act confirming the Provisional Order, s. 36 of the Act of 1876 would be fatal to his plea. Whether this admission was well founded or not, it is unnecessary, in the view I take on the merits, to discuss the question or to determine which of the alleged encroachments, if any, were made before the passing of the Act of 1880.

The defendant has also denied the right of the conservators to sue. On this point, though it is unnecessary to decide it, I think the conservators have under the award and their by-laws such an interest in the maintenance intact of the common that they would be entitled to sue in order to prevent an encroachment: see the *Chislehurst Common Case* (1) and *Lee Conservancy Board* v. *Button*. (2)

In my opinion the judgment of Younger J. must be discharged except so far as it recognizes that the fences on the boundary of close 97 are not an encroachment, and in lieu thereof there should be a declaration in the terms read by Swinfen Eady L.J.

The defendant has substantially succeeded and the plaintiffs should pay the costs here and below.

SCRUTTON L.J. I am of opinion that Younger J. came to a correct conclusion in this case, and regret that I am unable to agree with the judgments just delivered.

Mr. John Amphlett, the owner of old inclosures bordering on Clent Hill Common in the county of Worcester, appeals against a judgment of Younger J. which has declared that certain fences erected by him inclosing strips of land on the common side of his ancient hedges are encroachments on the common. This judgment was given against him in an action brought by the conservators of Clent Hill Common, a statutory body created by a Provisional Order confirmed by Parliament, and an award made thereunder.

In this action the conservators alleged that the map under the inclosure award showed the boundaries of the common they regulated, and that Mr. Amphlett's fences were by the map encroachments on that common. Mr. Amphlett replied: 1. That the conservators had no right to sue, not being owners of the soil. 2. That the hedges which the plaintiffs said were the boundaries of the com-

(1) [1901] 1 Ch. 389, n. (2) 12 Ch. D. 383, 409.

mon were his property, and that he had, in a way to be considered hereafter, a ditch-width of about four feet on the common side of these hedges. 3. That if his fences went beyond this "ditch-width" they were small encroachments on a "give-and-take" principle, which the law would not trouble about in view of their size. 4. That the map did not really show the hedges as his boundaries or bind him, and his fences were not shown to be on land other than his own.

On the first defence Younger J. held that the conservators could sue, and I agree with him. They were a statutory body appointed, amongst other things, for the general management of a common defined on a map with powers to make by-laws for the prevention of encroachments thereon, and they appear to have sufficient interest in the common to maintain an action to prevent its being taken away from the public. Similar decisions have been given with regard to the rights of conservators of rivers as to interference with the towpaths the soil of which they do not own, though they can stop interference with the public right of navigation: *Lee Conservancy Board* v. *Button* (1); *Kent* v. *Thames Conservators* (2), where the conservators counterclaimed as to the towpath. Other decisions are quoted by Younger J. This objection to the action in my opinion fails, and it would, I think, be a public calamity if the conservators of a common could not protect it by action from encroachment.

To understand the legal position of the award map its history must be stated. Clent Hill Common had no authority who could control and regulate it, and, owing to its proximity to large towns in the Midlands, was in danger of suffering from too great popularity. The Commons Act, 1876, provided a means of regulating it, and Mr. Amphlett in 1879 was the leading spirit in an application for its regulation. The map of the common which must accompany the application was prepared after a survey in 1879 by Mr. Taylor on Mr. Amphlett's sole instructions. This map has disappeared, but I have no doubt it was, as to the extent of the common, substantially the same as the later maps, for only this one survey was made. The exact area of the common—171 acres 3 roods no perches—was mentioned, which must have involved an exact survey, and it was

(1) 12 Ch. D. 383, 409, 410; 4 App. Cas. 685.

(2) Unreported (C. A.).

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stated that the improvement, which includes general management, of the whole of the common was desired. This application was publicly inquired into by an assistant Commissioner, who reported to the Inclosure Commissioners. The Commissioners then prepared a draft Provisional Order, obtained the consent of two-thirds in value of the interests in the common affected by the Order, including Mr. Amphlett, and certified the expediency of the Provisional Order, which was then, after examination by a committee, confirmed by Parliament. The Provisional Order referred to a map of the common substantially the same as to boundaries as the first map, no fresh survey having been made, and applied to the whole of the common. Publicity and inquiry were not yet finished. Under s. 13 of the Act of 1876 the procedure followed in an inclosure was then pursued, and a valuer, Mr. Taylor, appointed. The same valuer who had made the original survey and map again went through a public investigation of the matter before he finally made his award in 1881. That award had a map annexed in which the common was delineated by an edging of green colour, and the award gave public rights over " the whole of the said common." The map itself said that " the external boundaries of the common are edged green," and on looking at the map a green edge of colour terminates in a black line. Finally the Inclosure Commissioners confirmed the award. Mr. Amphlett promoted the application for this procedure, assented to the Provisional Order, caused the map to be drawn on which the application proceeded, was cognizant of all the proceedings, and very frankly stated in his evidence " that the map was sent up to form an area over which the by-laws should have force," namely, " up to the outer edge of the green line," which is the black line bounding the green ; and again : " I told Taylor to mark out that portion of manorial common over which it was proposed by-laws should run." I do not understand after this evidence how it is possible to contend that the whole procedure was not intended to fix the extent of common to be regulated.

Reserving for the moment the question as to what the black line means, I do not see how it is open to Mr. Amphlett now to say the area and boundaries of the common are other than as they were shown in the application map, and confirmed in the award map, when those maps are properly understood.

The award map seems to me clearly a " public document " and evidence within the principles stated by Lord Blackburn in *Sturla* v. *Freccia* (1), Farwell J. in *Attorney-General* v. *Antrobus* (2), and in *Mercer* v. *Denne*. (3) Public bodies have contributed public funds for the conservancy of this common as shown on the map, and the lord of the manor has surrendered his rights in the soil.

Younger J. has relied on the decisions in *Cook* v. *Mitcham Common Conservators* (4) and *Chislehurst Common Conservators* v. *Newton* (5), in which Farwell J. and Chitty J. held the map of the common, confirmed by Act of Parliament, binding and conclusive as to the limits and extent of the common. These cases, I think, stand in a slightly different position, as they were regulated under the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122). Under that Act the procedure is that a scheme is prepared by the Inclosure Commissioners and that scheme is then confirmed by Parliament. The scheme in the case of Mitcham Common regulated " land as the same is delineated in a plan " : the Chislehurst scheme also defined the common by reference to a plan ; there appears here to be a direct parliamentary confirmation of the map.

Under the Commons Act, 1876, under which Clent Hill Common is regulated, the Act confirming the Provisional Order does not conclude the matter, nor confirm a map, but a valuer under the Inclosure Act, 1845, then draws up an award with map which is confirmed by the Inclosure Commissioners. While by s. 105 of the Inclosure Act, 1845, every matter and thing set forth in the inclosure award (to which a map must be annexed) shall be binding and conclusive on all persons whomsoever, by s. 49 nothing in the Act shall enable the valuer to determine the title to any lands except in the case of encroachments within twenty years preceding the award ; as to these, according to the decision in *Blackett* v. *Ridout* (6), the award is conclusive. In *Jacomb* v. *Turner* (7) Collins J. held that a partition award under the Inclosure Acts was not conclusive against a person who had a good possessory title to lands included in it and was not a party to any proceedings dividing it. I think this case would have

(1) (1880) 5 App. Cas. 623.
(2) [1905] 2 Ch. 193.
(3) [1904] 2 Ch. 541.
(4) [1901] 1 Ch. 387.
(5) [1901] 1 Ch. 389, n.
(6) [1915] 2 K. B. 415.
(7) [1892] 1 Q. B. 47.

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been decided differently had Jacomb been one of the parties requesting the partition of the lands; he would have been estopped from disputing the partition as shown on the map. In the present case, in the same way, if it can be ascertained what the map shows as the extent of the common to be delineated, I think Mr. Amphlett, who caused the first map to be prepared by survey and applied for the regulation of the common shown on it, is now estopped, no fresh or other survey having been made, from alleging that any lands shown on the award map, which in my view is clearly the same as the first map, and put forward by the same valuer who prepared the first map and made the only survey ever made, as part of the common, are really not included in the common. This now rests on a personal estoppel against Mr. Amphlett, but in the view of Buckley L.J. in *Blackett* v. *Ridout* (1) the award would be conclusive as to lands delineated by the valuer as forming the common to be regulated. In giving a newly-formed body power to restrain encroachments on and improve a common shown on a map which is confirmed I find great difficulty in understanding how it can be contended that really it was intentionally left in doubt what were the boundaries of the common to be regulated.

The next question is, What does the map show as to the boundary? One of the subordinate surveyors who prepared the map for the application under the direction of Mr. Taylor, who ultimately was the valuer, was called. He said that where hedges were the boundaries they measured to the centre of the growers; in case of permanent fences to the fence; in case of wall and iron fencing to the fencing. Now the map is on such a scale that without more it would be difficult to say what was the boundary, or within two or three yards where it ran; but along all the places of the alleged encroachments there are T marks on the side away from the common. Mr. Amphlett's witness, Fowler, explained "a T mark relates only to a natural growing fence and is only so used"; and again, "a T always meant a growers fence plus some land." Mr. Matthews said "a T would not be put to show a wall; there must have been a hedge there." In all the places where encroachments are alleged there are T's, and all the witnesses agree as to this that T's at least mean that the hedge belongs to the owner of the land on the side of

(1) [1915] 2 K. B. 423.

the line on which the T appears. Mr. Amphlett said himself, " The line of the old growers is marked in black lines on the map." Why the surveyor should measure to the centre of the hedge when the whole hedge belonged to the old inclosure I do not understand, but he says he did. Younger J. has accepted his statement, and it is the line so fixed which the application, the Provisional Order, and the award state as the boundary of the common.

Mr. Amphlett, however, argued, and this was his main contention, that it being admitted that he owned the hedge, he also owned a " ditch-width " of about four feet outside it, in which he had a right to erect a fence to protect his hedge; and this whether there was or was not in fact a ditch outside his hedge.

There is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be four feet from the base of the bank on which the hedge stands. I am not aware of any legal authority for this broad proposition. In 1808 Bayley J. is reported in Selwyn's Nisi Prius, 13th ed. vol. ii. p. 1244, to have ruled at Somerset Assizes that " Where two adjacent fields are separated by a hedge and ditch, the hedge prima facie belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership." In 1810, in *Vowles* v. *Miller* (1), also tried at the Somerset Assizes, it appears that the defendant had cut away the edge of a ditch, which the plaintiff said was on his land; the defendant alleged that there was a bank and ditch, and he was therefore entitled to four feet width for his bank and four feet for his ditch. The jury found the defendant had not trespassed. On application for judgment or new trial the case is only reported on technical questions of pleading, but Lawrence J. in the argument rejected the alleged rule about four feet and eight feet, and found an explanation in the landowner's cutting his boundary ditch on the edge of his own land and throwing the soil inwards to make a bank, both ditch and bank being therefore his. In 1827 in *Doe* v. *Pearsey* (2) Holroyd J. said: " Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the

(1) 3 Taunt. 137. (2) (1827) 7 B. & C. 304, 307.

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bank." In the same year in *Noye* v. *Reed* (1), where undertenants of the same landlord had hedges and ditches bounding a field lane belonging to the landlord, it was held that the ditches did not belong exclusively to the owners of the banks, there being no ground for a presumption of boundary where all the land belonged to the same landlord. In 1895 in *Marshall* v. *Taylor* (2) the Court of Appeal limit the " supposed presumption " to a ditch which is known to be artificial, and do not apply it to a ditch which may have been a natural watercourse. In *Earl of Craven* v. *Pridmore* (3) Ridley J., starting with a " well-recognized presumption (*Vowles* v. *Miller* (4) ") that when a man's land is bounded by a fence and a ditch in that order he owns them, held that acts of ownership by the adjoining owner displaced it. The Court of Appeal held the alleged acts of ownership insufficient, and spoke of the well-established presumption that in land bounded by a hedge and ditch the title extended to the further edge of the ditch. In 1904 a similar point was raised in the Divisional Court in *Henniker* v. *Howard* (5), and Lord Alverstone speaks of " the original strong presumption of a ditch made, the earth thrown back, and a hedge placed upon the side of the ditch next to the man's land who has made the ditch," and declined to displace it by evidence of neutral acts. In 1905 in *Simcox* v. *Yardley Rural Council* (6), in a dispute as to a ditch bounding a road laid out under an inclosure award, the judge found that the ditch was not made by the highway authority, but by the owner of the adjoining close, and that bank and ditch belonged to the latter. These are, I believe, all the reported cases on the subject, and they appear to be limited to artificial ditches, and to establish a presumption that in the case of land bounded by a hedge and artificial ditch the boundary of that land extends to the further edge of the ditch. The presumption is not rested on the necessity of protecting the hedge, and any four feet or eight feet rule is only mentioned once to be rejected.

If the matter is rested on local custom, none was pleaded; if pleaded, it would have been necessary to state the locality over which it extended, and the exact extent of the custom.

If it is said that in fact the Court can find the boundary of Mr.

(1) 1 Man. & Ry. 63.
(2) [1895] 1 Ch. 641.
(3) 17 Times L. R. 399.
(4) 3 Taunt. 137.
(5) 90 L. T. 157.
(6) 69 J. P. 66.

Amphlett's land to be four feet from his hedge, I can see no evidence on which this finding can be based or legal presumption which justifies it, and it is contrary, in my view, to the evidence of the award map.

Mr. Amphlett claimed a ditch-width of about four feet as protection for a hedge, whether there was a ditch or not, or whether there was a fence at the edge of the four-feet width or not. It existed, he said, though the hedge was on a sloping bank where there was no presumption of a ditch. He thought on this common all traces of the original ditches for ancient inclosures had been lost except that there were depressions in some places. He thought the ditch width was recognized on Clent Hill Common, but could not say it appeared anywhere else. One of his witnesses thought that every owner of an agricultural fence had a ditch-width the other side of it, varying in width with the locality. In Birmingham he said it was three feet, except on commons and parish boundaries, where it was four feet, and he put its justification in the protection of the hedge. Mr. Fowler thought it made no difference whether there was a ditch or not—the owner of a grower fence always had some land outside it. This evidence does not suggest any right of the owner of a hedge over the soil of another, but apparently means that the Court must presume that where a man has erected a hedge he has erected it four feet back from the edge of his land, and therefore that the boundary of his land is that distance back from some line either the middle of the hedge or the bottom of the bank. I can only say that I know of no authority in law for such a rule, that I do not think any judge can decide accordingly without evidence, and that the evidence in this case fails, in my opinion, to establish such a rule. In fact, in this case Mr. Amphlett has always admitted in Court that the fences he has erected are in places more than four feet from the centre of the hedge, and has offered, if they are, to adjust them to a four-feet boundary. If the particulars delivered by the plaintiffs are accurate, the fences exceed the limit to a considerable extent, and the conservators would have been justified in proceeding against Mr. Amphlett in respect of the excess.

I do not think it necessary to deal with the matter, on which much evidence was expended, whether the banks on which the growers stand are natural or artificial, and whether the depressions which

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now in some places exist are the relics of old artificial ditches; in my view the map decides the boundary of the common as the centre line of the growers. For the same reason I do not think it necessary to decide whether there were, when the map was made, in some places the remains of old fences outside the growers which the new fences replace. The map has in my view fixed the boundaries of the common.

For these reasons I have come to the conclusion that Younger J.'s decision was right and the appeal should be dismissed. But I recognize that unprotected growers on a popular common may easily be destroyed, and that it would be a detriment to the amenities of the common if they were replaced by stiff and unclimbable iron fences. The palings close to hedges shown in some of the photographs do not seem to me to constitute any serious infringement of the common, and I think the conservators might well consider whether something less than the letter of their strict rights would not be fair both to Mr. Amphlett and the common.

Solicitors for appellant: *Geare & Son, for Marcy, Hemingway & Sons, Bewdley.*

Solicitor for respondents: *P. F. Walker, for H. Neild Collis, Stourbridge.*

G. A. S.

SARGANT J.
1917
Dec. 19.

In re SHUREY.
SAVORY *v.* SHUREY.
[1917 S. 1724.]

Will—Construction—Gift to Persons attaining Age of Twenty-five—Date when Age reached.

The testator left his residuary estate upon trust for such of his three sons, C. S. and two others who were named, "as shall attain the age of twenty-five years." The eldest son, C. S., was born on July 22, 1891, and died on July 21, 1916—namely, on the day immediately preceding the twenty-fifth anniversary of the day of his birth:—

Held, that C. S. had attained the age of twenty-five years at the time of his death.

THE testator in this case, by his will, left the residue of his estate, subject to an annuity to his widow, upon trust for such of his three sons, Charles Shurey, Harry Reginald Shurey, and Gordon Lindsay Shurey, "as shall attain the age of twenty-five years."

The eldest son, Captain Charles Shurey, was born on July 22, 1891, and on July 21, 1916—that is to say, on the day immediately preceding his twenty-fifth birthday—he died of wounds received in action.

One of the trustees of the will took out an originating summons raising the question whether Charles Shurey had, at the time of his death, attained the age of twenty-five years and taken a vested interest in a third of the testator's residue.

R. H. Hodge, for the plaintiff, stated the facts and the question for decision.

Romer, K.C., and *W. J. Whittaker*, for H. R. Shurey and G. L. Shurey, were not called upon to support their view that Charles Shurey had attained the age of twenty-five years at the time of his death.

A. Grant, K.C., and *Evelyn Riviere*, for the other defendants. If the will is to be construed according to its strict legal meaning, it cannot be argued that Charles Shurey had not attained the age of twenty-five years at the time of his death. In *Anonymous* (1) it was

(1) (1704) 1 Salk. 44.

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"adjudged that if one be born the first of February at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will of land, and dies, it is a good will, for he was then of age." And in *Sir Robert Howard's Case* (1) Holt C.J. held that "if A. be born on the third day of September, and on the second day of September twenty-one years afterwards he makes his will, this is a good will; for the law will make no fraction of a day, and by consequence he was of age." And in *Toder* v. *Sansam* (2) this ruling was held to be the law. But in the present case the testator should be held to have used the words "attain the age of twenty-five years" in their ordinary sense, namely, on the twenty-fifth anniversary of the day on which the legatee was born. In *Letterstedt* v. *Broers* (3) Lord Blackburn said: "The appellant . . . . was born on the 13th of May, 1853, and consequently attained the age of twenty-one on the 13th of May, 1874, and the age of twenty-five on the 13th of May, 1878."

Romer, K.C., in reply. The technical rule has been recognized as the law by the Legislature in s. 79 of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), which enacts that, for the purposes of the part of the Act in which the section is contained, "a person shall be deemed according to the law in England, Wales, and Ireland, as well as according to the law in Scotland, not to have attained the age of seventeen until the commencement of the seventeenth anniversary of the day of his birth, and similarly with respect to other ages."

SARGANT J. This is a short point which is completely covered by authority, and it is this: Does a person attain a specified age in law on the anniversary of his or her birthday, or on the day preceding that anniversary? [His Lordship stated the facts, and continued:] The question is whether, under those circumstances, Charles Shurey took a vested interest in the testator's estate?

The authorities cited begin with an *Anonymous* (4) case. There the point was put in the barest possible way, and so as to make the anomaly seem as great as possible. I will, however, alter the language, to make it more intelligible, and it comes to this: "It

(1) (1699) 2 Salk. 625.
(2) (1775) 1 Bro. P. C. 468, 469.
(3) (1884) 9 App. Cas. 371, 373.
(4) 1 Salk. 44.

has been adjudged that, if one be born the first of February at eleven o'clock at night, and makes his will, with regard to lands, at one o'clock in the morning on the last of January in the twenty-first year of his age, it is a good will, for he was then of age." In that case a will of real estate was mentioned because at that time a will of personal estate could be made by a person before he attained the age of twenty-one years. If one were actually to look at the clock for the purpose of determining the age of the devisee in that case, it would appear that he was one day and twenty-two hours short of attaining the age of twenty-one years; but the law does not take cognizance of part of a day, and the consequence is that a person attains the age of twenty-one years, or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday, or other birthday, as the case may be.

A similar decision was arrived at in *Sir Robert Howard's Case* (1); and what had been so laid down was assumed in the House of Lords in *Toder* v. *Sansam* (2) to be a correct statement of the law. Mr. Grant suggested that the testator in the present case was using the words "attain the age of twenty-five years" in their popular sense, and he referred to a sentence of Lord Blackburn in the Privy Council in *Letterstedt* v. *Broers* (3), in which he spoke of a person attaining the age of twenty-one years on the twenty-first anniversary of her birthday, and the age of twenty-five on the twenty-fifth anniversary; but nothing turned in that case upon the distinction between that day and the day preceding.

There is nothing to show that in this will the testator was not using the words in their legal sense, and, that being so, I must place the legal interpretation on the words he used. Mr. Romer has pointed out that this slight legal anomaly, as one may call it—in the sense that the words, legally construed, have an effect rather different from that which they would be understood to have in ordinary parlance—is recognized by the Legislature in s. 79 of the National Insurance Act, 1911, which expressly provides that, for the purposes of the part of that Act in which the section is placed, a person shall be deemed to have attained the age of seventeen years, not on the day preceding the anniversary of his birth, but on the actual

(1) 2 Salk. 625. (2) 1 Bro P. C. 468.
(3) 9 App. Cas. 371, 373.

SARGANT J. 1917 SHUREY, *In re.* SAVORY *v.* SHUREY.

seventeenth anniversary of the day of his birth. I must declare that Captain Charles Shurey attained the age of twenty-five years on the day preceding the twenty-fifth anniversary of the day of his birth. (1)

Solicitors for all parties : *Gush, Phillips, Walters & Williams.*

F. E.

C. A. 1917 PETERSON J. *May* 21, 22, 23, 24 ; *June* 5, 6, 7 ; *July* 10. C. A. *Oct.* 29, 30, 31 ; *Nov.* 1, 2, 5, 7.

AMMONIA SODA COMPANY, LIMITED *v.* CHAMBERLAIN.

[1916 A. 624.]

Company—Director—Misfeasance—Payment of Dividends out of Capital—Lost Capital on Revenue Account—Appreciation of Capital Assets—Subsequent Profits—Liability to recoup lost Capital before Payment of Dividends—Fixed Capital—Floating Capital.

The Companies (Consolidation) Act, 1908, does not, nor does the general law, prohibit a company from distributing the clear net profit of its trading in any year unless its paid-up capital is intact or until it has first made good all trading losses incurred in previous years.

There is no rule of law which forbids a company from setting off an appreciation in the value of its capital assets, as ascertained by a bona fide valuation, against losses on revenue account.

A manufacturing company carrying on a newly-established business incurred losses on its trading account for some years after its incorporation and subsequently made profits. The directors set off the losses against an appreciation of the company's capital assets as ascertained by a valuation made by two of their number who were not expert valuers and approved by the company in general meeting, and paid dividends out of the subsequent net profits without any further provision for replacing the losses. Depreciation of buildings, machinery, and plant had been charged in revenue account to an amount exceeding the losses :—

Held by Peterson J. : (1.) that in considering whether or not the dividends were paid out of capital the sums charged for depreciation could be written back to capital ;

(2.) that as the valuation was in fact made bona fide, and was approved by the company in general meeting, the appreciation in value could properly be set off against losses.

Held by the Court of Appeal and Peterson J. : (1.) that there was

(1) And see *Herbert* v. *Torball* (1663) 1 Sid. 162.—F. E.

no objection in law to such a revaluation and such a treatment of the appreciation in value ascertained thereby;

(2.) that, apart from any question as to the depreciation allowed for buildings, &c., and whether or not the revaluation could be justified, the dividends were not in fact paid out of capital but out of current profits.

Lee v. *Neuchatel Asphalte Co.* (1889) 41 Ch. D. 1, 15; *Verner* v. *General and Commercial Investment Trust* [1894] 2 Ch. 239, 266; *In re National Bank of Wales* [1899] 2 Ch. 629, 669, considered and applied.

The observations of the Lords in *Dovey* v. *Cory* [1901] A. C. 477 cannot be considered as having overruled or qualified the previous decisions of the Court of Appeal in the above-mentioned cases.

Per Swinfen Eady L.J.: The fixed capital of a company is what the company retains in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income independent of any further action of the company, or, being retained by the company, are made use of to produce income or gain profits. The circulating capital of a company is a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets which, or the proceeds of which, are intended to return to the company with an increment and to be used again and again and always return with accretions. When circulating capital is expended in buying goods which are sold at a profit or in buying raw materials from which goods are manufactured and sold at a profit the amount so expended must be charged against or deducted from receipts before the amount of any profit can be considered.

WITNESS ACTION.

This was an action by the plaintiff company claiming that the defendants, Mr. Arthur Chamberlain and Mr. Cocking, ought to make good the sum of 8203*l.* 18*s.* 4*d.*, the amount of the dividends paid on September 30, 1912, March 31, 1913, September 30, 1913, and April 4, 1914, and also the sum of 4264*l.* 12*s.*, part of the dividend of 4912*l.* 10*s.* 1*d.* paid on March 31, 1915 (a total of 12,468*l.* 10*s.* 4*d.*), or so much thereof respectively as was paid out of capital.

The material facts were as follows:—

In July, 1908, the plaintiff company was incorporated as a private company with a capital of 10,000 shares of 10*l.* each, subsequently increased to 15,000 shares of 10*l.* each, making a total of 150,000*l.*, for the purpose of acquiring, developing, and working as brine land the Holford Hall Estate, Cheshire, containing about 260 acres,

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with underlying beds of rocksalt. This property was conveyed to the company in consideration of 55,000*l.* in shares and the liability under a mortgage of the property for 46,086*l.*, making a total of 101,086*l.*, of which 15,281*l.* was attributed to property passing on delivery, thus leaving 85,805*l.* for land, buildings, and fixtures.

The company then proceeded to erect works and sink another borehole and shaft with the object of developing the land as a brine field and utilizing the brine for manufacturing purposes, and until the early part of 1911 was not in a position to show profits. In April, 1911, one of the directors, Mr. Arthur Chamberlain, sen. (since deceased), suggested that the company should be converted into a public company and raise the additional 150,000*l.*, which the company needed, by the issue of preference shares to that amount. The difficulty in the way was that the company then owed the bank 10,000*l.*, and in addition there were debentures for 18,000*l.* and the mortgage debt of 46,000*l.* The balance-sheet for December 31, 1910, showed a loss of 19,028*l.* 5*s.* 4*d.* up to that date, comprising a sum of 10,601*l.* 16*s.* 7*d.* representing depreciation on buildings, machinery, and plant. This depreciation fund was increased to 13,702*l.* 15*s.* 7*d.* by July 31, 1911, and to 16,293*l.* 14*s.* 5*d.* by January 31, 1912. In these circumstances it was desirable, before inviting applications for preference shares, to be able to produce a balance-sheet which did not on the face of it show a loss of this description, and it appeared possible to do this if the land were of sufficient value to cancel the debit to profit and loss account.

At a board meeting on July 12, 1911, it was resolved that, having regard to the various boreholes that had been made and the amount of knowledge that had been acquired of the brine and salt land, it was desirable to make a revaluation of the land, and Mr. Chamberlain, sen., and the defendant Mr. Cocking were requested to report to the next board meeting what sum would represent, in their opinion, the value of the land in accordance with the knowledge which the company then possessed. Neither Mr. Chamberlain, sen., nor the defendant Mr. Cocking had had any previous experience in valuing salt or brine lands. They ultimately advised that the land should be valued at 79,166*l.*, taking no account of its surface value but adding to that amount the expenses incurred in sinking shafts and other items already expended on it and charged against it in

the books. They based this valuation of the land upon the practically inexhaustible supply of brine and upon the solid beds of rocksalt, both of which had been proved to exist as the result of the works executed by the company since the purchase of the land.

The value of the land having been increased in this way, the balance-sheet for July 31, 1911, was prepared: "This balance-sheet" [the following statement of the facts is taken from the judgment of Peterson J.] "showed the land as of the value of 83,788*l.* 9*s.*, being the aggregate of 63,246*l.* 6*s.* 5*d.* and 20,542*l.* 2*s.* 8*d.*, the additional value on revaluation by the directors. On the other side of the account this additional value appeared under the heading of 'Reserve Account,' and from it were deducted the balance to the debit of profit and loss account (19,028*l.* 5*s.* 4*d.*) less the profits for the seven months up to July 31 (5682*l.* 3*s.* 2*d.*) and income tax recouped (375*l.* 3*s.* 11*d.*), and also the item of 1500*l.* for goodwill which had appeared in the previous balance-sheet and a premium on redemption of debentures (1980*l.*), leaving a balance to reserve account of 4091*l.* 4*s.* 5*d.* The object of the revaluation was thus achieved, the debit balances were wiped out, and the way was open for the conversion of the company into a public company and for inviting subscriptions for preference shares. The balance-sheet was signed by Mr. Chamberlain, sen., and by Mr. Cocking, and the auditors, Messrs. Thomas Johnston & Co., certified the balance-sheet, adding a special note which called attention to the fact that the directors had revalued the land, increasing the value by 20,542*l.* 2*s.* 8*d.*, which had been placed to a reserve account, against which had been written off loss on trading to date 12,990*l.* 18*s.* 3*d.*, goodwill 1500*l.*, and premium on redemption of debentures 1980*l.*, and contained the statement that 'subject to the foregoing in our opinion the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs.' It is to be observed that while the auditors called attention to the revaluation and to the application of the increase they do not appear to have advised the directors that it was improper to apply the increase in value to the writing off of the various items to which they referred. The balance-sheet was presented to and approved by a board meeting held on September 27, 1911, at which Mr. Chamberlain, sen., and the two defendants were present.

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"On October 31 an extraordinary general meeting of the company was held, when seven members were present, including Mr. Arthur Chamberlain, sen., and the two defendants. At this meeting it was resolved that the company should be converted into a public company, that the capital should be increased by the creation of 150,000 preference shares of 1*l.* each, and that the accounts for the seven months ended July 31, 1911, and the directors' and auditors' reports thereon be received and approved of, and that the revaluation of the salt land therein referred to should likewise be approved. The company therefore in general meeting sanctioned and approved of the valuation which had been made by Mr. Cocking and Mr. Chamberlain, sen.

"In March, 1912, a balance-sheet and a profit and loss account were prepared as of January 31, 1912. The balance-sheet showed an additional value upon revaluation by the directors 16,450*l.* 18*s.* 3*d.*, this figure being the result of deducting from the original 20,542*l.* 2*s.* 8*d.* the balance of 4091*l.* 4*s.* 5*d.* remaining at reserve in the balance-sheet of July 31, 1911, while the profit and loss account showed a balance of profits for the year of 7348*l.* 13*s.* after deducting the sum of 5682*l.* 3*s.* 2*d.* which had been passed to reserve in the balance-sheet of July 31, 1911. A prospectus was then issued in May, 1912, inviting applications for the preference shares and resulted in the allotment of a considerable number of shares. On these preference shares dividends were paid amounting in the aggregate to 13,116*l.* Neither of the defendants held any of these preference shares. In the early part of 1916 Brunner, Mond & Co., Limited, purchased the bulk of the ordinary shares and a large portion of the preference shares at par, and appointed their nominees as directors, and in due course the new board instituted this action."

The action was tried before Peterson J. on May 21, 22, 23, 24, and June 5, 6, 7, 1917, when a considerable amount of evidence was given, the result of which is stated by his Lordship in his judgment.

Gore-Browne, K.C., Sir John Simon, K.C., and *J. H. Stamp*, for the plaintiff company.

Clauson, K.C., and *D. D. Robertson*, for the defendants.

Cur. adv. vult.

1917. July 10. PETERSON J., after stating the facts above set out, continued: It will be convenient if at this stage I state the conclusion at which I have arrived with respect to the revaluation. In my judgment the directors were not guilty of any mala fides in the matter. Mr. Chamberlain, sen., was obviously the master spirit in the company, and admittedly he was a man who had a high reputation for integrity and capacity. It was said that the object of this revaluation was to enable the company to obtain further capital by the issue of preference shares. I think that this was so; but there is nothing unlawful or reprehensible in that object. The only ground on which complaint could be made is that the object was achieved by improper means. The directors no doubt would have been better advised if they had obtained a revaluation from some expert valuer, although, if one may judge by the evidence on the subject which I have heard, the margin of difference between the views of valuers on the subject is very great. But there is no rule of law which requires directors to obtain outside assistance in such matters or prevents them from valuing the property themselves, provided, of course, that they act honestly in doing so. In this case the directors requested two of their number to revalue the land; and unfortunately the two who were selected were not really competent to deal with the problem. As I view the evidence, the directors, not being adequately conversant with the salt business, entertained inflated ideas of the value of the large deposit of rocksalt which had been discovered, and the members of the company who attended the extraordinary general meeting on October 31, 1911, all of whom seem to have been business men, appear to have held the same mistaken belief. In my judgment, the valuation, whatever may be its demerits, was honestly made, and I exonerate the directors from any charge of mala fides in connection with it. While this method of revaluation is clearly open to animadversion—and, indeed, no serious attempt was made to justify the basis on which it was constructed—it still may be that the result is approximately correct, and I have therefore to consider whether the land in August, 1911, was approximately of the value of 83,788*l*. The evidence which was adduced on this point was more than usually divergent. [His Lordship then reviewed the evidence in detail, and continued:]

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I do not propose to attempt to say what in July, 1911, was the real value of the land as part of a successful undertaking. On the evidence before me I think that it was less than 80,000*l.* and considerably in excess of 60,000*l.* Nor do I think that it is necessary for me to arrive at a more definite or precise conclusion. The directors of the plaintiff company in my view honestly entertained the view that the land in 1911 had largely increased in value, and the plaintiff company in general meeting adopted their views knowing that the valuation had been made by the directors, and knowing, as they must have known, that the directors who had made the valuation were not professional valuers or men who had had a long experience in the salt business.

There is not any ground for suggesting that any facts were concealed from the shareholders by the directors. In these circumstances it is not, in my opinion, open to the company to attack the directors for an honest, though it may be erroneous, estimate which has been expressly adopted by the company in general meeting after the attention of its shareholders had been pointedly called to the resolution by the auditors' certificate which was attached to the balance-sheet.

It was contended, however, that there was no justification for the payment of the dividends in question, even if the valuation was honest and even if in its result it was correct. Mr. Gore-Browne said that the essential question was whether or not capital assets could be written up so as to justify payment of a dividend ; that the valuation, however careful and however thorough and satisfactory to the Court, was not a justification for paying dividends ; that the profit and loss account was a continuous account which was always open, and that there was no profit on it until all past losses had been worked off. My attention was directed to a long series of cases which dealt with the method in which a company's accounts ought or ought not to be kept, but it is not altogether easy to reconcile them. I have before me, however, the warning of Lord Halsbury and Lord Macnaghten in *Dovey* v. *Cory* (1), and I propose to lay to heart as far as possible the example of Lord Macnaghten when he declined to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs.

(1) [1901] A. C. 477.

There is one distinction which should, I think, be remembered for the purposes of the present case. A dividend may be improper because it is paid out of capital, or it may be open to objection because it is paid when there are no profits available for the purpose. If during the year there is no balance to the credit of profit and loss account, any dividend which is paid must be provided out of the paid-up capital, and any such payment must reduce the paid-up capital. This is exemplified in one of the early cases in which interest was paid on share capital before the company had reached the stage when its receipts on trading exceeded its outgoings: *In re National Funds Assurance Co.* (1) Such a payment is clearly a reduction of the paid-up capital and is ultra vires. But where a company has made losses in past years and then makes a profit out of which it pays a dividend the question is a different one. Such a dividend is not paid out of paid-up capital. If it were, the paid-up capital would be still further reduced by the payment. In fact the assets representing the paid-up capital remain the same or of the same value as before the payment of the dividend. It may be that the balance to the credit of profit and loss account ought to be applied in making up lost capital, and it may be that the directors are liable for neglecting to apply it in this way. But such a payment does not involve a reduction of capital; it involves a failure to make good capital which has already been lost: see *Bond* v. *Barrow Hæmatite Steel Co.* (2) If payment of dividends out of the balance to the credit of profit and loss is open to attack, it is, I think, on the ground (omitting any question of dishonesty) that the course adopted is one which is contrary to the practice which governs all competent business men in the keeping of their accounts. This is possibly another aspect of the distinction on which stress has sometimes been laid between the two propositions that dividends must not be paid out of capital and that dividends can only be paid out of profits.

In the present case the dividends in question were not paid out of capital, if the word "capital" is used as meaning assets which at the time in fact represented paid-up capital. They were in fact paid out of the balance standing to the credit of profit and loss account for the years in which they were paid. The question in this case, therefore, is whether any profits which were made had to be applied in

(1) (1878) 10 Ch. D. 118. (2) [1902] 1 Ch. 353, 364.

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making good any losses of previous years, and whether an increase in the value of the fixed capital could be taken into consideration for the purpose of wiping out previous losses of paid-up capital.

On the first question the decisions are such that any business man who consulted them for the purpose of ascertaining whether he could frame his accounts in a particular way might easily find that his difficulties had not been diminished. As the law stands at present losses of circulating capital must be made good before there are any profits out of which dividends can be declared; but having regard to the observations of Lord Davey in *Dovey* v. *Cory* (1), the question whether a similar rule applies in the case of fixed capital appears to be still open. At the same time Lord Halsbury in *Dovey* v. *Cory* (1) expressed some doubt whether an abstraction of this kind, however proper in economic treatises, is applicable to the concrete realities of business life. What is circulating capital and what is fixed capital is a question which in many cases may well embarrass the business man and the accountant as well as the lawyer. According to some of the definitions, the same asset may be fixed capital in one company and circulating capital in another. It has, for instance, been suggested that investments are fixed capital when they are bought for permanent retention, while they are circulating capital if they are bought for the purpose of reselling them at a profit. One economist has argued that houses and lands if purchased for resale are circulating capital, but that if land is bought with a view to retention as a permanent investment it is fixed capital. In *Lee* v. *Neuchatel Asphalte Co.* (2) asphalte mines held for a term which were exhausted by working them were treated as being fixed capital: see *In re National Bank of Wales* (3); while in *Bond* v. *Barrow Hæmatite Steel Co.* (4) Farwell J. considered that iron ore mines of leasehold tenure which had been acquired for the purpose of providing the company with ore for smelting and buildings used in connection with them were circulating capital, and the reasoning would seem to indicate that if the tenure had been freehold the same conclusion would have been reached. I have, however, come to the conclusion that it is not necessary for me to attempt to determine what is the true view on these vexed questions.

(1) [1901] A. C. 477.
(2) 41 Ch. D. 1.
(3) [1899] 2 Ch. 629, 670.
(4) [1902] 1 Ch. 353.

The plaintiffs in substance allege that the debit to profit and loss account, amounting to 19,028*l.*, or, after deducting the profits up to July 31, 1911, and return income tax, 12,960*l.* 18*s.* 3*d.*, ought to have been made good out of profits before there were any profits available for dividend. The greater part (13,722*l.* 15*s.* 7*d.*) of this debit of 19,028*l.* represented a depreciation of 2½ per cent. on buildings and 7½ per cent. on plant and machinery which had been written off as representing a diminution in value of these assets. The question is whether it is prohibited to utilize an increase in the value of the fixed assets for the purpose of wiping out this deficiency in the value of the capital assets. Sir Woodburn Kirby and Mr. Gibson both expressed the view that it could not. Sir Woodburn's opinion was that it was contrary to all principles of commercial accountancy to write up the value of a fixed asset and apply the surplus so obtained to meet a deficit on trading, and Mr. Gibson stated that such a course was absolutely wrong and "illegal." Sir Woodburn also accepted the proposition that it is a recognized and accepted principle of commercial accountancy that nothing should be taken into profit unless it is first realized. This, however, goes too far, for stock and book debts are habitually brought into profit and loss account before being realized, and probably Sir Woodburn intended to confine his statement to fixed assets. I am not satisfied that the proposition that it is contrary to all principles of commercial accountancy to utilize an increase in the value of a fixed asset for the purpose of getting rid of a debit which represents loss of paid-up capital is not too wide. It may be a precept of prudence and yet be far removed from the sphere of the categorical imperative. Assuming that a company ought to keep the value of its assets up to the amount of the liabilities and paid-up capital, or, in other words, to see that its paid-up capital is intact, why should it be absolutely precluded from stating the true value of its assets? If an agricultural company has land under which valuable coal measures are discovered, it is difficult to see why it should not be allowed to show in its balance-sheet the increased value of its lands. If it is necessary or proper that a company shall maintain its assets at the amount of its paid-up capital and liabilities, there would not appear to be anything illegitimate in showing that the assets are equal to the paid-up capital and liabilities. Nor for this purpose can it matter that the

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increased value is due to the fixed assets. The paid-up capital is represented by both fixed and circulating capital, and it seems somewhat arbitrary that circulating capital may be shown at its true value while fixed capital must not. Take the case of a depreciation fund. The effect is that the value of the assets as shown in the account is diminished by the amount of the depreciation fund. If the assets in fact increase in value to the extent of the depreciation fund, there is no rule which prohibits a company from wiping out the depreciation fund from the liabilities side of the account. In *Bond* v. *Barrow Hæmatite Steel Co.* (1) Farwell J. held that if a sum is carried from profits to reserve account to meet an estimated deficiency of capital assets, and the assets subsequently increase in value to the necessary amount, the sum which has been carried to reserve account is not part of the capital, or, in other words, the subsequent increase in value may be utilized for the purpose of wiping out the previous estimated loss. To my mind it seems hardly logical to say that while this may be done in the case of an estimated loss it is necessarily illegitimate in the case of one which has been ascertained.

It would be a strange result if directors were prohibited from showing that the assets, fixed and circulating, were of a value equal to the liabilities and paid-up capital and yet, on a petition for reduction of capital, were required to show that the value of the assets was less than the amount of the paid-up capital and liabilities: see *In re Barrow Hæmatite Steel Co.* (2) If the present value of the assets were such that, notwithstanding previous losses, the paid-up capital was intact, the company would fail on a petition for reduction of capital and would, on the plaintiffs' contention, be bound to apply future profits for the purpose of making good past losses on the hypothesis, which had been proved to be false, that the paid-up capital was not intact. It is also to be observed that in *Lee* v. *Neuchatel Asphalte Co.* (3) the decision both of the Court of Appeal and of the Court of first instance proceeded upon a finding that the value of the assets, ascertained by valuation, was greater than it was when the company commenced its business. This was a case in which the question was whether dividends could be paid, and the Courts which dealt with

(1) [1902] 1 Ch. 353. (2) [1900] 2 Ch. 846.
(3) 41 Ch. D. 1.

it did not see any impropriety in ascertaining whether the capital assets had in fact been increased or diminished in value. Directors would no doubt not be justified in ascribing to a fixed asset a value which is the result of purely temporary fluctuations. It is one thing to treat an unrealized increase in value of a fixed asset as profit and to pay dividends out of it as profits; but it appears to me to be a different question whether in considering whether there is a deficiency in paid-up capital owing to past losses, which ought to be made good out of future profits, the real value of the assets can be ascertained with the object of discovering if in fact there is a deficiency in the paid-up capital.

As Lindley L.J. said in *Lee* v. *Neuchatel Asphalte Co.* (1), "You must not have fictitious accounts. If your earnings are less than your current expenses, you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend." In saying this the learned judge plainly meant that you must not pay a dividend out of your paid-up capital. In *Bond* v. *Barrow Hæmatite Steel Co.* (2) Farwell J. summarized the result of the authorities in this way: "there is no hard and fast rule by which the Court can determine what is capital and what is profit." The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question: per Lord Halsbury in *Dovey* v. *Cory.* (3) It may be safely said that what losses can be charged to capital and what to income is a matter for business men to determine, and it is often a matter in which the opinion of honest and competent men will differ: *Gregory* v. *Patchett.* (4) "There is no hard and fast legal rule on the subject": per Lindley M.R. in *In re National Bank of Wales.* (5) A similar view was expressed by Warrington J. in *Hinds* v. *Buenos Ayres Grand National Tramways Co.* (6)

In the present case the business men who were the directors and shareholders of the plaintiff company, of whom some at least were very competent, were of opinion that it was, in the circumstances, quite proper to apply the increase in the value of the fixed assets

(1) 41 Ch. D. 1, 25.
(2) [1902] 1 Ch. 353, 364.
(3) [1901] A. C. 477.
(4) (1864) 33 Beav. 595.
(5) [1899] 2 Ch. 629, 670.
(6) [1906] 2 Ch. 654, 659.

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in cancelling the previous deficiency of capital assets, and that, as the company's assets were equal to the liabilities and paid-up capital, there was no adequate ground for contending that the balance to the credit of profit and loss account ought to be applied in making up paid-up capital which had been lost. Even if the increase in the value of the fixed assets ought not to have been applied in this way, I should not be inclined to hold the directors liable for the dividends which were paid. The problem is not by any means a simple one. I am satisfied that the directors acted honestly. What they proposed to do was clearly shown in the balance-sheet and the auditors' report which were submitted to the general meeting of the company in October, 1911. Most, if not all, of the shareholders who attended that meeting were commercial men, and they unanimously approved of the proposal. The auditors, while they properly called attention to the revaluation by the directors and to the way in which it was proposed to apply the increase in the value of the land, do not appear to have advised the directors or the shareholders that there was any impropriety in dealing with the increase in this way; and the same firm of auditors and an additional firm of auditors, both of whom were admittedly experienced chartered accountants, certified the balance-sheet of January 31, 1912, without suggesting any doubts as to the correctness of the course which had been pursued. "Directors are not liable for all the mistakes they may make, although, if they had taken more care, they might have avoided them. . . . . Their negligence must be, not the omission to take all possible care; it must be much more blameable than that: it must be in a business sense culpable or gross": per Lindley M.R. in *In re National Bank of Wales.* (1) In a case where there is no question of an ultra vires act it would be difficult for the company to make directors liable for following a course which had been approved by the shareholders, with full knowledge of the facts, in general meeting.

In my judgment, then, the present action fails, and must be dismissed with the usual consequences.

R. M.

C. A. The plaintiff company appealed. The appeal was heard on October 29, 30, 31, and November 1, 2, 5, 7, 1917.

(1) [1899] 2 Ch. 629, 672.

Gore-Browne, K.C., and *J. H. Stamp*, for the appellant company. The payment of the dividends was ultra vires, and therefore the respondent directors are liable to refund them. First, the payment was made out of capital and therefore ultra vires. Secondly, if it was not, it was a payment contrary to the articles which required that dividends should be paid only out of profits, and on the facts there were no profits available for such payment. Thirdly, the Court ought not, in the exercise of its discretion under s. 279 of the Companies (Consolidation) Act, 1908, to relieve the directors.

When once there is a debit on the profit and loss account no dividend can be paid until that debit has been made good. Against that contention there is only the dictum of Wright J. in *In re Crichton's Oil Co.* (1) He there said: "I do not think that there is any rule of law that profit on one year's trading cannot be divided merely because on the profit and loss account there is a deficit over on the balance of former years." That statement is not supported by any reported case, and is, it is submitted, wrong. A company cannot divide the profits of one year until it has made good previous losses of capital. It has no right to segregate any particular year and distribute the profits made in that year when it has in previous years incurred a heavy loss of capital. Until that loss has been made good no dividends can properly be paid. In the present case the losses incurred by the company in the first three years of its trading, which necessarily appeared in the profit and loss account as a reduction of capital, ought when profits were made in the fourth year to have been notionally treated as standing to the debit of the profit and loss account and to have been made good before any dividends were paid. These losses were made in respect of the floating capital of the company, and although it may not be necessary that the fixed capital of the company should be maintained, yet it is necessary that the floating capital should be kept up before any dividends can be paid out of subsequent profits: *Bond* v. *Barrow Hæmatite Steel Co.* (2); *Foster* v. *New Trinidad Lake Asphalte Co.* (3); *Dovey* v. *Cory* (4); *Lee* v. *Neuchatel Asphalte Co.* (5)

(1) [1910] 2 Ch. 184, 196.
(2) [1902] 1 Ch. 353.
(3) [1901] 1 Ch. 208.
(4) [1901] A. C. 477.
(5) 41 Ch. D. 1.

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The meaning of the word "profits" is explained by Fletcher Moulton L.J. in *In re Spanish Prospecting Co.* (1) and in *Lee* v. *Neuchatel Asphalte Co.* (2) In *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) Romer L.J. said: "The whole question of the right of a company to divide profits in any one particular year without making good previous losses of its assets is really awaiting an authoritative judgment of the House of Lords."

[SWINFEN EADY L.J. Is not the result of the decision in *Lee* v. *Neuchatel Asphalte Co.* (2) that there was nothing in any of the Companies Acts which required a company to keep up the value of its assets to the nominal amount of its issued capital before paying a dividend?]

That, no doubt, is the result of the dicta in that case, but was not the decision. That case does not decide that, where there have been actual losses in trading, profits subsequently obtained may be applied in dividend without first making good those losses. Here there were no profits in the sense in which the word is used in the articles until losses had been made good.

Further, it is submitted that Peterson J. was wrong in holding that the revaluation was made bona fide. It was made by writing up the value of the land with the object of inducing persons to take preference shares in the company and thereby to enable the plaintiff company to obtain further capital. It was not made, as it should have been, by skilled valuers, but by persons who did not possess the necessary qualifications for making it. As to the necessity for writing off a proper amount for depreciation of machinery before arriving at the profits of a business, *In re Crabtree* (4) is an illuminating case.

A company may be so constituted, as this is, that it can only pay dividends out of profits, and when that is the case depreciation must be written off: *Lee* v. *Neuchatel Asphalte Co.* (2); *Verner* v. *General and Commercial Investment Trust.* (5)

The word "capital" has two distinct meanings. It may mean either capital invested in assets or funds subscribed for capital. The question is what is meant by the word "capital" in the rule

(1) [1911] 1 Ch. 92, 98.
(2) 41 Ch. D. 1.
(3) [1902] 1 Ch. 146, 159.
(4) (1912) 106 L. T. 49.
(5) [1894] 2 Ch. 239.

that dividends must not be paid out of capital. Apart from decisions, its natural meaning would be that part of the assets which on taking an account would represent the subscribed capital of the company. No doubt fixed capital may be converted into circulating capital, and vice versa. It is not a universal proposition that the state of the fixed assets may be disregarded. It is submitted that directors here were not entitled to revalue the land of the company so as to bring the increment of the capital value of the land into account in the balance-sheet for the purpose of justifying a payment of dividends. An increment in the value of land, unless realized, cannot be used to write off a loss on income account and thereby justify a payment of dividends: *Lee* v. *Neuchatel Asphalte Co.* (1); *Foster* v. *New Trinidad Lake Asphalte Co.* (2); *Verner* v. *General and Commercial Investment Trust.* (3) It is the business of a company to retain its fixed capital. Assets sunk in a bad bargain are treated as sunk in acquiring fixed capital, and the company can nevertheless pay dividends. It is not left to business men to determine whether dividends are or are not paid out of capital. The rule is not that "you shall not pay dividends out of what business men hold to be share capital." The accounts are to be drawn up according to sound business principles (which are primarily matters of evidence), and it is for the Court to say as a matter of law whether on the facts appearing by the accounts as so drawn up the moneys applied in payment of dividend are capital or profits. The analogy of patent actions applies where the scientific principles and state of knowledge are matters of expert evidence, but the Court decides whether the patent is good or has been infringed. [They also referred to *Leeds Estate, Building and Investment Co.* v. *Shepherd.* (4)]

Clauson, K.C., and *D. D. Robertson*, for the respondents, were not called upon.

Cur. adv. vult.

1917. Nov. 7. SWINFEN EADY L.J. read the following judgment:—This is an appeal by the plaintiff company from the judgment of Peterson J. dismissing the action. In the autumn of the year 1915 the plaintiff company was the owner of lands in Cheshire of about

(1) 41 Ch. D. 1, 26.
(2) [1901] 1 Ch. 208, 212.
(3) [1894] 2 Ch. 239, 265.
(4) (1887) 36 Ch. D. 787.

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160 acres with extensive beds of rocksalt and two proved brine flows. They also had buildings and machinery which had been erected at a cost, including the cost of exploration of the lands, of upwards of 150,000*l.* The plaintiff company's predecessors purchased the land in 1907. It had taken several years to erect the works and establish the business, and by the year 1911 it had become a paying concern. For the thirteen months ending January 31, 1912, the net profit made was 13,030*l.*, and for the twelve months ending January 31, 1913, the net profit was 15,669*l.*—in each case after charging depreciation, mortgage and debenture interest, directors' fees, and other outgoings. The business carried on by the plaintiff company apparently competed with the business of Brunner, Mond & Co., and in the autumn of the year 1915 Brunner, Mond & Co. approached the directors and negotiated for and ultimately purchased substantially all the shares of the company. They thus obtained entire control of the plaintiff company, including all effective voting power; the old directors retired, and a new board nominated by Brunner, Mond & Co. took its place. The first report of the new board is dated April 29, 1916, for submission to the shareholders in general meeting on May 16, 1916, and the present action was commenced on May 18, two days after. The object of the action was to obtain a declaration that the dividends paid between September, 1912, and March, 1915, were paid out of capital, and to have the amount refunded by the defendants to the company. The dividends alleged to have been paid out of capital are the following amounts:—916*l.* 10*s.* 7*d.* paid on September 30, 1912; 2429*l.* 2*s.* 7*d.* paid on March 31, 1913; a similar amount on September 30, 1913, and a similar amount on April 4, 1914; and a further sum of 4264*l.* 12*s.*—part of 4912*l.* 10*s.* 1*d.*—paid on March 31, 1915. Thus the total amount claimed in this action as dividends alleged to have been paid out of capital is 12,468*l.* 10*s.* 4*d.*

If the claim were well founded it would be immaterial that Brunner, Mond & Co. had acquired their shares at what the parties agreed to be the value after all these dividends had been paid, and that the repayment of the amount to the company would now in effect operate to enable Brunner, Mond & Co. to acquire a substantial additional benefit. The real question is: Were these dividends paid out of capital? Peterson J. held that they were not, and the

plaintiff company contends that his judgment was erroneous. There is no dispute between the parties that these dividends were not paid out of the subscribed capital in the ordinary sense ; on the contrary, it is admitted that they were paid out of net profits earned during the period in respect of which the dividends were paid. This is clearly the case, and is admitted on the face of the report of April 26, 1916, already mentioned. The plaintiff company contends, however, that, although net profits earned during the period, they were not available for dividend, and cannot really be considered "profits," as in the earlier period of the plaintiff company's history a loss had been incurred, and they contend that until such loss has first been made good there cannot be any profits in the true sense of the word.

In my judgment this argument is unsound and has been exposed again and again. The Companies Acts do not impose any obligation upon a limited company, nor does the law require, that it shall not distribute as dividend the clear net profit of its trading unless its paid-up capital is intact or until it has made good all losses incurred in previous years. Upon this point it is only necessary to refer to three decisions of the Court of Appeal and one in the House of Lords.

In *Lee* v. *Neuchatel Asphalte Co.* (1) Cotton L.J. said: "The plaintiff's second point is that the property of the company is not now sufficient to make good the share capital ; that assets to provide for that share capital must be paid up before any dividend can be declared ; and that if dividends are declared without that being done, that is to be treated as a return and a division of capital amongst the shareholders, and therefore illegal. In my opinion that is entirely wrong. It is a misapplication of the term 'return of capital.'" Later on he said: "But if the Court sees that the directors and the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, and then in what is really a matter of internal arrangement (if it is done honestly, and does not violate any of the provisions of the articles) the Court is very unwilling to interfere, and in my opinion ought not to interfere, with the discretion exercised by the directors, who have the management of the company or with the powers

(1) 41 Ch. D. 1, 15, 18.

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exercised by the company, within the articles." Lindley L.J. said (1): "I may safely say that the Companies Acts do not require the capital to be made up if lost. They contain no provision of the kind. There is not even any provision that if the capital is lost the company shall be wound up, and I think this omission is quite reasonable. The capital may be lost and yet the company may be a very thriving concern. As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks 250,000*l.* before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its 250,000*l.*, which has been sunk in building up a property which if put up for sale would perhaps not yield 10,000*l.*? That is a business matter left to business men." Then later he said: "Having shewn from the Acts (negatively, of course, because this is a negative proposition, and can only be proved by looking through the Acts) that the Acts do not require the capital to be made up if lost, I cannot find anything in them which precludes payment of dividends so long as the assets are of less value than the original capital." Lopes L.J. was of the same opinion.

The next case was *Verner* v. *General and Commercial Investment Trust*. (2) Lindley L.J., in delivering the judgment of himself and A. L. Smith L.J., said: "The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain, is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." Then later on he said: "there is nothing in these Acts," (i.e., the Companies Acts, 1867 and 1877)

(1) 41 Ch. D. 22, 23. (2) [1894] 2 Ch. 239, 266, 267.

"any more than in the Act of 1862, which prevents a company which has lost part of its capital from continuing to carry on business and declaring and paying dividends." Kay L.J. said (1) that he did not know of any law to prevent income received from being divided, whether part of the capital is lost or not; and he added that "it might be difficult to frame such a law, without unduly interfering with the liberty of commercial proceedings."

In *In re National Bank of Wales* (2) Lindley M.R., in delivering the judgment of the Court, said: "It is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact." And again, after referring to *Lee* v. *Neuchatel Asphalte Co.* (3) and to *Verner* v. *General and Commercial Investment Trust* (4), he said: "What was lost there, was fixed capital, and it is obvious that circulating capital, or any other money employed in earning returns, must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether such money be called circulating capital or by any other name) there can be no profits; and no ingenious process of book-keeping can alter the fact. It is not denied that in this case the annual receipts did exceed the annual outgoings, and, the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate." And later on: "It was stated in the judgment of this Court in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (5) that, if directors act within their powers —if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience— and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. We believe this statement of the law to be correct, and we adopt it as our guide."

Lastly, in the same case in the House of Lords, under the name of *Dovey* v. *Cory* (6), some observations of Lord Macnaghten may appropriately be cited with reference to the large number of points

(1) [1894] 2 Ch. 270.
(2) [1899] 2 Ch. 629, 669, 670, 671.
(3) 41 Ch. D. 1.
(4) [1894] 2 Ch. 239.
(5) [1899] 2 Ch. 392.
(6) [1901] A. C. 477, 488, 493.

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of detail upon which Mr. Gore-Browne invited us to express an opinion. He said: "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more." Lord Davey approved of the principle laid down by Lord Romilly in *Rance's Case* (1) with a slight qualification. He also cited with approval a passage in Lindley L.J.'s judgment in *Verner* v. *General and Commercial Investment Trust* (2), which I have already read, beginning with the words "'Perhaps the shortest way of expressing the distinction.'"

The distinction between "fixed" capital and "circulating" capital is not to be found in any of the Companies Acts; it appears to have first found its way into the *Law Reports* in *Lee* v. *Neuchatel Asphalte Co.* (3), where Lindley L.J. in his judgment adopted the expression which had been used by Sir Horace Davey in argument, derived from writers on political economy. It is necessary to consider the sense in which the expressions "fixed capital" and "circulating capital" were used in that case and in *Verner's Case.* (4) What is fixed capital? That which a company retains, in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits. A trust company formed to acquire and hold stocks, shares, and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company acquiring or erecting works with machinery and plant is an instance of the latter. In these cases the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. What is circulating capital? It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and

(1) (1870) L. R. 6 Ch. 104.
(2) [1894] 2 Ch. 266.
(3) 41 Ch. D. 1.
(4) [1894] 2 Ch. 239.

circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it, and with the goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest. He retains, more or less permanently, bank premises in which the money invested becomes fixed capital. It must not, however, be assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated. This purpose may be changed as often as considered desirable, and as the constitution of the bank may allow. Thus bank premises may be sold, and conversely the money used as circulating capital may be expended in acquiring bank premises. The terms "fixed" and "circulating" are merely terms convenient for describing the purpose to which the capital is for the time being devoted when considering its position in respect to the profits available for dividend. Thus when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from, receipts before the amount of any profits can be arrived at. This is quite a truism, but it is necessary to bear it in mind when you are considering what part of current receipts are available for division as profit.

Now, to return to the facts of the present case. The plaintiff company was registered in the year 1908 as a private company, and took over the property and assets of a partnership which carried on business as the Ammonia Soda Company. No profit was made on the sale of the concern by the partnership to the company. The plaintiff company took over all the assets and property at the price which they had cost the firm and paid for them in shares. The substance of the transaction was that the private partnership was converted into a private company. It was carried on as a private company for three years until 1911, when, further capital being

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needed to the extent of about 150,000*l.*, it was decided to convert the private company into a public company. At this time its capital was 150,000*l.* in ordinary shares, and it was decided to increase it to 300,000*l.*, the additional capital created being 150,000*l.* in 6 per cent. preference shares which were to be issued to the public. The private partnership having been formed in 1907, it had taken four years to carry out the exploratory works, erect plant and machinery, and bring the concern to a profit-earning stage. Before the conveyance of September 2, 1907, to the partnership of the 160 acres of land the existence of a brine run on the premises, furnishing a supply of brine which was practically inexhaustible, had been established. After the purchase a shaft was sunk to work this brine; another boring was made which proved the existence of a second brine run, the hydrostatic level of which differed by some 20 feet from that of the first boring, but probably it had some connection with the first. After a tool had been broken in the borehole this was abandoned. Another boring was also made to the depth of 2509 feet, which was not successful in achieving the purpose for which it was sunk, but nevertheless produced a wholly unexpected, startling, and unique result. The purpose of the sinking was to reach water into which could be turned the effluent from the plaintiff company's works and so dispose of it. This purpose failed, but a new bed of rocksalt, of a thickness of 666 feet or thereabouts, was proved, the existence of which was previously entirely unknown and unsuspected. The directors and their advisers considered that the results obtained by this expenditure increased the value of the plaintiff company's property considerably in excess of what had been expended upon it. There was, however, in the year 1911, when the plaintiff company was contemplating the issue of preference shares, an amount standing to the debit of profit and loss of 19,028*l.* 5*s.* 4*d.* This amount arose by debiting to that account, at a time when the plaintiff company's gross trading profit was insufficient to provide for the purpose, the following sums for depreciation of buildings, plant and machinery—namely, for the twelve and a half months ending January 12, 1910, 5383*l.* 6*s.* 6*d.*; for the year ending December 31, 1910, 5218*l.* 10*s.* 1*d.*; and for the seven months ending July 31, 1911, 3119*l.* 3*s.* 6*d.*, making together 13,721*l.* 0*s.* 1*d.* These sums represent a book-keeping entry of $2\frac{1}{2}$ per cent. on build-

ings and 7½ per cent. on plant and machinery, but there is no evidence of any actual depreciation of these items during this period. There were also debited during the same period large sums for directors' fees and mortgage and debenture interest. By reason of these debits there stood to the debit of profit and loss in May, 1911, when the issue of preference shares was contemplated, the said sum of 19,028*l*. The directors proceeded to write off this debit balance in a manner which I will explain directly, and which is the foundation of this action; but if they had not done so, was there anything to prevent the payment of dividends out of subsequent net profits? In my opinion there was not, for the reasons already stated. The directors were not under any obligation to recoup any lost capital before dividing net profit subsequently earned; and if money of a company be lost before any profits have been earned, which is alleged to have been the case here, it can only be capital which has been lost.

Mr. Gore-Browne invited the Court to lay down that wherever there was a debit to the profit and loss account, irrespective of the way in which it arose, of the stage in the company's operations, and of the nature and business of the company, it was illegal to divide profits subsequently earned without first writing off out of those profits the amount of the debit. To do so would be to fall into the error which Lord Macnaghten pointed out should be avoided, and would only serve to harass and embarrass business men and impose upon companies a burden which Parliament has abstained from casting upon them. (1) The directors in this case were of opinion that no capital had been really lost, and they were of opinion that the value of the land and works as a going concern had been increased, as a result of their boring and exploratory work, to a considerably greater amount than 19,028*l*. A committee of directors was appointed to look into the matter and value the land. Mr. Cocking, who made a valuation, was a mining engineer and scientific chemist, and had planned the works which had been erected. With his assistance the committee arrived at the conclusion that the sum at which the premises stood in their books was far below its real value, and on the revaluation the amount was increased by 20,542*l*. 2*s*. 8*d*.

The judge in the Court below has found that the directors were

(1) See *Dovey* v. *Cory* [1901] A. C. 488.

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acting perfectly honestly, and in good faith, in so doing. The balance-sheet fully disclosed what had been done; the auditors drew attention to it in their certificate written at the foot of the balance-sheet, and it was explained to, and concurred in by, the shareholders in general meeting, and the report and accounts were received and adopted. In my opinion, in thus acting the directors were merely stating in their balance-sheet what, upon reasonable grounds, they believed to be the real value of their assets.

At the trial three expert valuers were called by the defendants, and each of them was of opinion that the land was of the value at which it was entered, and the judge in substance accepted their evidence. Indeed, he held that the estimate of value of Major Jackson, who was called for the plaintiffs, did not even approach the real value. The mode in which Mr. Cocking had arrived at his value was not attempted to be justified, but the amount arrived at was the fair value of the land. The result of increasing the value at which the land stood was to give a credit which would have enabled the debit of 19,028*l.* to be written off. Part of it was, however, actually written off out of subsequent net profits. Now, the debit consisted in part of a nominal depreciation in the fixed assets of the company, buildings, plant and machinery, and as regards the balance it consisted of sums paid out of the subscribed capital of the company for mortgage and debenture interest and directors' fees, there not being sufficient trading profits to provide these amounts. The transaction was carried out with the full approval of the shareholders in general meeting, and in all honesty and good faith. The dividends complained of, paid out of net earnings in the subsequent years, were not paid out of capital, but out of profits, and the defendants are, in my opinion, under no liability whatever to repay the same, or any part.

The appeal fails, and should be dismissed.

WARRINGTON L.J. read the following judgment:—I am of the same opinion. In this case the plaintiff, the Ammonia Soda Company, Limited, claims to recover from two ex-directors the amount of certain dividends paid to preference shareholders, on the alleged ground that they were paid either (*a*) out of capital, or (*b*) at all events otherwise than out of profits, the articles of association pro-

viding that no dividend should be paid except out of profits of the company. It is unnecessary for me to restate the facts in detail; it is enough shortly to mention those which raise the question.

At the end of the year 1910 there stood to the debit of the profit and loss account the sum of 19,028*l.* 5*s.* 4*d.*, being the net loss on the trading of the company up to that time. By July 31, 1911, this loss had been reduced by subsequent profits to 12,970*l.* 18*s.* 3*d.* During the period ending on the same date the total amount allowed for depreciation of buildings and machinery had been the sum of 13,702*l.* 15*s.* 7*d.* The plaintiff company's land, if entered on the same footing as that previously adopted, namely, at cost with certain additions, the nature of which it is unnecessary to specify, would have stood at 63,246*l.* and some odd shillings. The directors, however, determined to enter it in the balance-sheet for the period ending July 31, 1911, at 83,788*l.*, namely, 20,542*l.* more than the 63,246*l.*, and to carry the 20,542*l.* to a reserve account. This they did, and to this reserve account they charged, amongst other sums, the 12,970*l.* 18*s.* 3*d.* standing to the debit of profit and loss. The result was to wipe off this debit. Subsequently considerable profits in trading were made, and out of these the dividends in question were paid.

In arriving at the amount of the profit for purposes of dividend there were deducted from the gross returns all money employed in earning them, including wages, cost of material, depreciation of buildings and machinery, and so forth. It is not suggested that any expense of this nature which ought to have been deducted was not deducted. That such proper deductions must be made is, I believe, all that Lindley L.J. meant in the passages relating to circulating capital contained in his two judgments in *Verner's Case* (1) and in *In re National Bank of Wales.* (2) As to the value of the land, the directors honestly believed that it was worth at least the extra 20,000*l.*, and I am quite satisfied that they had reasonable grounds for that belief. I am myself prepared to go further, and to say that the plaintiff company has failed to prove that the land was not of at least the value adopted by the directors.

Under these circumstances, can the directors be held liable for the payments they made? Lord Macnaghten gave utterance in

(1) [1894] 2 Ch. 239. (2) [1899] 2 Ch. 629.

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Dovey v. *Cory* (1) to a warning which should be borne in mind in all such cases as these. He said: "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more. I understand from my noble and learned friend, Lord Shand, that he also takes this view." There is, however, one accepted restriction on the powers of companies incorporated under the Companies Acts, namely, that they must not under the guise of dividends or in any other way return to their shareholders money subscribed for their shares unless it be with the sanction of the Court under the appropriate statutory provisions.

It has been asserted in this case, not for the first time, that there is a further restriction—suggested to be a corollary of the rule I have just mentioned—which would make it illegal for a company to pay dividends out of the profits of a current year, unless it first makes good deficiencies in paid-up capital occasioned by losses in previous years; or, to put the contention in a broader form, no dividends can properly be paid out of profits so long as there are losses previously incurred and not made good. In my opinion this alleged restriction has no foundation in law. It is not contended that there is anything in the statutes imposing it, and its suggested existence as a doctrine of the Court has been negatived by the Court of Appeal in *Lee* v. *Neuchatel Asphalte Co.* (2), *Verner* v. *General Commercial Investment Trust* (3), and *In re National Bank of Wales.* (4)

I am, of course, far from saying that in all such cases dividends can properly be paid without making good the previous loss; the nature of the business and the amount of the loss may be such that no honest and reasonable man of business would think of paying dividends without providing for it. In such a case I apprehend the Court would take the view that a payment which no honest and reasonable man of business would think it right to make could not properly be made by directors.

(1) [1901] A. C. 488.
(2) 41 Ch. D. 1.
(3) [1894] 2 Ch. 239.
(4) [1899] 2 Ch. 629.

We have no such case here. Even without taking credit for the appreciation of the land, I think the dividends paid were properly paid. They were not paid out of capital unless they were paid out of money which the directors were bound to treat as capital. For the reasons I have given the directors were not, in my opinion, bound to treat as capital the profits out of which the dividends were paid. They were not paid otherwise than out of profits, for they were clearly paid out of profits of trading clearly ascertained after making the necessary deductions.

But if I am wrong in this view, the case is made quite clear by accepting the view of the directors and treating the land as of the value at which they entered it in the balance-sheet. If I am right that they honestly and reasonably believed it to be of this nature, they were clearly entitled so to treat it in the balance-sheet; and the effect of so doing was to establish that there was no deficiency of paid-up capital, and no ground, therefore, for applying the restriction to which I have above alluded. The fund out of which the dividends were paid would then clearly be profits even if such restriction existed, as in my opinion it did not.

I am of opinion that the judgment of Peterson J. was right, and that the appeal should be dismissed.

Scrutton L.J. (1) If it had been necessary to decide every question of fact which has been raised in this case, there are some points on which I should have desired to hear the respondents' counsel; and if there had not been three previous decisions of the Court of Appeal discussing the subject-matter of the law which has been discussed here, I should certainly have desired very carefully to consider the language in which I expressed my judgment. The course, however, which the case has taken, and the opinion I have formed, enables me very shortly to express my view, and, having regard to the possibility that this matter will be reviewed by a superior tribunal who can deal with the whole matter, I think it right to express that opinion in my own words. I do not propose to repeat the facts which have been stated by Swinfen Eady L.J., all of which require the most careful consideration from any tribunal which has ultimately to deal with this case. But the

(1) This judgment was not written.

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facts which shortly raise the points to be decided appear to me to be these: An attempt is made to make the directors liable for dividends which their company has paid under their sanction. When the main facts are inquired into, it appears that those dividends amount to between 12,000*l.* and 13,000*l.*, paid in the years 1912, 1913, 1914, and 1915, and in amount they are less than the net profits which were made in those years; and in calculating those net profits allowance has been made for some 28,000*l.* for depreciation or wear and tear of fixed assets, and for some 32,000*l.* for repairs of those fixed assets. But what is said is this: "Although in the years in which you paid these dividends there were profits out of which you could pay them, in three previous years, 1909, 1910, and 1911, there had been a loss of 19,000*l.*, and the profits of subsequent years must be applied in the first instance to replace this loss." It is true that such a loss was shown in those years by deducting or writing off a depreciation of some 13,000*l.* on fixed assets and repairs. The answer to the attack made on the directors is put, as I understand it, in four ways at least. It is said first of all: "You are wrong in saying that there was a loss in the three preceding years, because one of our capital assets had appreciated to an extent which wiped out the loss on profit and loss account." Some land which had originally been valued at 60,000*l.* had increased in value to 80,000*l.* The learned judge in the Court below has found that there was an appreciation of value, but not so much as 80,000*l.*, and he did not think it necessary to find the amount of the appreciation. If it had been necessary for me to decide whether there was, and to what extent there was, such an appreciation, I should certainly have desired to hear Mr. Clauson, because, not having heard him, I am not at all satisfied at present with the method by which the directors arrived at the valuation of 80,000*l.*—which was obtained by a calculation proceeding largely on the value of the salt as a revenue-producing asset; and that although the plaintiff company had an inexhaustible brine supply which could always be worked, and until it was exhausted salt would not be worked. But it is not necessary, in the view I take, for me to decide any question of fact of that sort.

Secondly, it is said as an answer to the claim: "If we are wrong in finding a sufficient appreciation of capital assets to wipe out

the losses shown on profit and loss account, yet we, the directors, honestly and reasonably came to the decision that there was such an appreciation; and from that point of view, under the decision of the Court of Appeal in the *Lagunas Case* (1) and the House of Lords in *Dovey* v. *Cory* (2), we are not liable, even if we did, through that honest and reasonable mistake, pay dividends out of capital, or when there were no profits." I should have liked to hear Mr. Clauson on part of the facts necessary to support that proposition. As to honesty, I see no ground for interfering with the decision of the Court below. Of the two directors who made the valuation, Mr. Chamberlain, the father, has received the most abundant testimonials as to honesty from the plaintiff company's own witnesses, who do not dream of imputing to him dishonesty, whatever else he may have done; and as to the two directors who were attacked, Mr. Chamberlain, jun., and Mr. Cocking, the learned judge has seen both of them; he has heard their explanations, and he has found them honest, and I see no possible ground why I should interfere with his decision. If it were necessary for me to find that they acted reasonably, I should have wished to hear Mr. Clauson, because at present I am not satisfied as to their reasonable business conduct. But in my view it is not necessary for me to decide that in fact.

I come now to the third and fourth answers which are made to the attack. It is said shortly: "We might be liable if we paid dividends out of capital, but we did not pay dividends out of capital; we paid them out of profits"; and fourthly it is said: "If there was a loss of capital (which we dispute) there is no obligation to replace a loss of capital out of subsequent profits before dividends are paid." Without laying down a hard and fast rule which would settle all business cases and which Lord Macnaghten deprecates, I come to the clear conclusion that in a case where the facts are such as they are in this case the three decisions of the Court of Appeal in *Lee* v. *Neuchatel Asphalte Co.* (3), in *Verner* v. *General and Commercial Investment Trust* (4), and in *In re National Bank of Wales* (5) bind me to say that those two contentions of the defendants are accurate; and if they are to be reviewed or qualified, or any further rules are

(1) [1899] 2 Ch. 392.
(2) [1901] A. C. 477.
(3) 41 Ch. D. 1.
(4) [1894] 2 Ch. 239.
(5) [1899] 2 Ch. 629.

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to be laid down, they must be laid down by a higher tribunal than the Court of Appeal.

In the first place, as to whether the dividends were paid out of capital—assuming all the facts in the plaintiff company's favour—19,000*l.* was lost in the years 1909—1911. What was lost? It was not profits, because there were no profits to lose. It could be nothing else than capital that was lost, and when you have lost a thing you cannot use it for anything else, because you have lost it. You cannot pay dividends out of a thing which you have lost, because it is not there to pay dividends out of. Therefore I come to the conclusion which was come to in the three cases I have mentioned—that it is inaccurate to say that if in subsequent years you pay dividends, having lost capital in previous years, you are paying the dividends out of the capital that you lost in the previous years. It is only possible to support that suggestion by treating the profit when made in a subsequent year as in some way automatically turned into capital, and as replacing the capital which has been lost, and by saying that what was made as profit has in some way automatically become capital and must be treated as capital. I can find no foundation for that in the statutes or in the decisions; and the three cases in the Court of Appeal to which I have referred seem to bind me to hold the opposite.

Then dealing with the fourth answer, the latter of the two that I have just mentioned, it appears to me that the decisions of the Court of Appeal and the reasoning throughout the judgments in those three cases show that there is no obligation, except of the most limited character, to make good a loss of capital out of subsequent profits. I am not sure that the language in which Kay L.J. expressed it in *Verner's Case* (1) does not sufficiently express my position. He said: "These provisions seem to me to mean that any income received may be divided, whether part of the capital is lost or not. At present I do not know of any law to prevent this, and it might be difficult to frame such a law without unduly interfering with the liberty of commercial proceedings." Lindley L.J. in the same case began his judgment by saying: "The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first

(1) [1894] 2 Ch. 239, 264, 270.

making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances." When one looks to see what qualification the learned judge had in mind when he said " in all cases and under all circumstances," one finds that he introduces (1) a distinction, which seems to me in subsequent cases and in arguments to have been much misunderstood, between fixed and circulating capital. He introduced it in this way: " If the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain." That I understand simply to mean this, which, when stated, appears to me to be a truism: When you take receipts in an ordinary period, and to earn those receipts you have parted absolutely with some of your capital, as when you have sold goods for a price, you must not treat the price as net profits without deducting the value of the goods or the money representing the cost of the goods which you have parted with in order to obtain the price; in other words, you cannot treat as net profits what are actually gross profits. When a few lines later Lindley L.J. stated the principle he stated it with a view to the sentence which he had used just above, explaining what he meant by " circulating ": " Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." That appears to me simply to point to the extremely true and obvious proposition which he has used a little before, that you cannot take the gross receipts of the year without taking into account in finding the profits the part of the capital which you have parted with—circulated, sold—in order to obtain this profit, and I dwell upon this because I am startled to find that in the decision of Farwell J. in *Bond* v. *Barrow Hæmatite Steel Co.* (2) he has

(1) [1894] 2 Ch. 266. (2) [1902] 1 Ch. 353.

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extended Lindley L.J.'s proposition to wear and tear of fixed capital, which is not parted with at all, and has treated the wear and tear of buildings as circulating capital which must be made good. Such a meaning of the term "circulating capital" is certainly not the sense in which it was used by the economists from whom the definition was taken. Mr. Mill's definition of circulating capital was capital which fulfils the whole of its office in the production in which it is engaged by a single use; and certainly Mr. Mill would have been astonished to hear that a building which deteriorates by wear and tear was circulating capital within his definition. And in my view the proposition laid down by Lindley L.J., and approved by Lord Davey in the House of Lords, has to be very carefully limited to the facts with regard to which Lindley L.J. used it.

That being the view I take of the decisions of the Court of Appeal, it seems to me impossible to say that there was any obligation imposed either by statute or by the decided cases to replace the losses of 1909, 1910, and 1911 before the directors dealt with and divided the profits made in 1912, 1913, 1914, and 1915. It was suggested, as I understand, by Mr. Gore-Browne that while if he had only to deal with decisions of the Court of Appeal he might be in some difficulty, those decisions had been so shaken as to be rendered no longer binding on this Court by the judgment of the House of Lords in *Dovey* v. *Cory*. (1) I desire to say very respectfully that if the decisions of the Court of Appeal are to be overruled it must be done in a clearer way than has been done by the noble Lords in *Dovey* v. *Cory*. (2) Lord Halsbury said: "I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here"; and: "I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct." That, with great respect to the noble Lord, leaves the decision of the Court of Appeal where it was. It is a warning that on some future occasion the noble Lord may have to consider whether or not he is satisfied by the arguments he then

(1) [1901] A. C. 477. (2) [1901] A. C. 482, 486, 487.

hears for the reasons of the Court of Appeal, but it certainly leaves the decisions of the Court of Appeal binding on this Court; in fact, I respectfully sympathize and agree with the protest which Lord Halsbury made in that case as to bringing in the distinction between fixed and floating capital, which is appropriate enough to an abstract proposition like that which occurs in Adam Smith's "Wealth of Nations," but is quite inappropriate in concrete cases. Lord Macnaghten, in whose judgment Lord Shand concurred, said: "I desire . . . . to guard myself from being understood to assent to all the propositions supposed to have been laid down by the Court of Appeal in this case." He did not say which of the propositions he dissented from. He said they were supposed to be laid down; and again I respectfully say that one requires a much clearer expression from the House of Lords than that before one can treat a decision of the Court of Appeal as overruled. Lord Davey, who went into rather more detail, adopted the view of the principle as stated by Lindley L.J. in *Verner's Case* (1), reserving the question for future consideration as to the effect of an actual and ascertained loss. I find nothing in that decision which renders the views of the Court of Appeal within their legitimate compass no longer binding upon us; and, finding those decisions spread over a period of some twenty years, I adopt them, and I come to the conclusion that on the third and fourth points raised in answer to the attack made on the defendants in this case the decisions of the Court of Appeal bind me to say, first of all, that these dividends were not paid out of capital, for the capital, if lost at all, had been lost in preceding years, and could not be used to pay dividends; secondly, that there was in this case no obligation on the plaintiff company, before paying dividends out of profits accrued in an ordinary period of its working, to make good losses of capital which had accrued in a previous ordinary working period.

For these reasons I agree with the judgments of my brothers.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Hartley & Blyth, for J. H. Gold, Northwich; Morris & Bristow, for William Morris, Birmingham.*

(1) [1894] 2 Ch. 239, 266.

W. I. C

NEVILLE J.

1917

Nov. 30
Dec. 7

1918
Jan. 11.

In re MACARTNEY.

MACFARLANE *v.* MACARTNEY.

[1914 M. 1817.]

Will—Legatee of Stock—Testator Trustee of Stock for a Company—Stock an Asset of the Company—Failure of Legacy—Other Legacies thereby increased in Value—Compensation—Election.

A testator by his will gave a sum of colonial stock to M. and all his shares in company A. to several persons in varying proportions. The testator held substantially all the issued share capital of the company, and that company had promoted company B. and held 90 per cent. of its issued share capital. The stock was in fact held by the testator in trust for company B., so that the gift to M. failed :—

Held, that the legatees of the shares of company A. could not take the benefit of their legacies without compensating M. in respect of her legacy of the stock, and that such compensation was a charge on their legacies in an amount equal to the value of the stock at the death of the testator.

The rule as to compensation laid down in *Whistler* v. *Webster* (1794) 2 Ves. Jun. 367 and *Pickersgill* v. *Rodger* (1876) 5 Ch. D. 163 approved.

Wollaston v. *King* (1869) L. R. 8 Eq. 165 distinguished.

ADJOURNED SUMMONS.

J. F. Macartney, by his will dated November 19, 1911, after stating " I value my estate and effects without taking into account my shares in Macartney, McElroy & Company Limited of London or the Malta Tramway Company Limited of London as follows," then gave a list of several items of personal estate with their respective values, including a sum of 3000*l.* South Australian 4 per cent. Inscribed stock which he valued at par. The testator then bequeathed the 3000*l.* South Australian stock upon trusts for the benefit of his daughter Maggie Macartney ; and after bequeathing other sums of stock upon trusts for the benefit of his six other children, and, after defining his " heirs " to mean his said seven children, gave numerous pecuniary legacies to (amongst other persons) his seven children ; and the testator, after referring to his shares in Macartney, McElroy & Co., Limited, gave those shares amongst his seven children (including Maggie Macartney) in varying propor-

tions, and appointed the plaintiff and two other persons (who renounced probate) the executors of his will.

The testator died in February, 1913.

The testator was a contractor, and carried on his business under the name of Macartney, McElroy & Co., Limited; and at the date of his will and of his death he held about 95 per cent. of the issued share capital of that company, and that company held about 90 per cent. of the issued share capital of Malta Tramways, Limited (in the will described as the Malta Tramway Company, Limited), which had been promoted by Macartney, McElroy & Co., Limited, with the object of acquiring and working a tramway concession in Malta. But Malta Tramways, Limited, was a failure. It never acquired the concession and never did any business, and its only asset was the said sum of 3000*l.* South Australian stock, which represented a balance of subscriptions to the company and was registered in the name of the testator and was in fact held by him in trust for Malta Tramways, Limited. The only reference by the testator to the shares of Malta Tramways, Limited, was in the commencement of his will above stated, and his will did not deal with those shares except so far as they might be affected by the gift of the 3000*l.* South Australian stock to Maggie Macartney.

In January, 1915, the plaintiff on an originating summons obtained the usual judgment for the administration of the personal estate of the testator, and in June, 1916, under the inquiry as to debts, Malta Tramways, Limited, claiming to be creditors of the testator, issued a summons in the administration asking for a declaration that the testator was a trustee for them of the 3000*l.* South Australian stock and for a transfer to them of that stock from the executors. Subsequently the plaintiff issued a construction summons in the administration to determine, amongst other questions arising under the will, whether the gift of the 3000*l.* South Australian stock in favour of Maggie Macartney had failed or whether that gift was to any and what extent capable of taking effect.

In October, 1917, these two summonses by arrangement came on together and were heard in camera (Maggie Macartney and most of the other legatees of the shares in Macartney, McElroy & Co. being infants), when the Court decided (inter alia) that the 3000*l.* South Australian stock belonged to Malta Tramways,

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Limited, and directed the question with regard to the gift of that stock to Maggie Macartney to stand over with the view of seeing whether a compromise could be arrived at by or on behalf of Maggie Macartney and the legatees of the shares in Macartney, McElroy & Co. having regard to the decision that the South Australian stock belonged to Malta Tramways, Limited.

The negotiations for a compromise having failed, the two summonses came on again in camera on November 30, 1917, the question being whether Maggie Macartney, the gift to her of the South Australian stock having failed, was entitled to any and, if any, what compensation.

Howard Wright, for the plaintiff and for the defendant Page, who was the testamentary executor of the will in Malta.

Ward Coldridge, K.C., and *F. K. Archer* (for *Tyldesley Jones*, serving with His Majesty's Forces), for Maggie Macartney.

Jenkins, K.C., and *Dighton Pollock*, *W. R. Sheldon*, and *J. H. Stamp*, for the legatees of the shares in Macartney, McElroy & Co., Limited, other than Maggie Macartney.

J. H. Stamp, for Malta Tramways, Limited.

The following cases were referred to in the course of the arguments :—*Whistler* v. *Webster* (1), *Wollaston* v. *King* (2), *Cooper* v. *Cooper* (3), *Pickersgill* v. *Rodger* (4), *Rogers* v. *Jones* (5) and *In re Lord Chesham*. (6)

Cur. adv. vult.

1917. Dec. 7. NEVILLE J. in a written judgment stated the facts, and continued: It will be seen that the testator was not entitled to the whole beneficial interest in the 3000*l.* stock standing in his name, and that the specific bequest to Maggie Macartney cannot take effect in the manner directed in the will. The whole of the beneficial interest in this stock is in Malta Tramways, Limited, and its shareholders, and in the main will pass by the will to the legatees of the shares of Macartney, McElroy & Co., Limited. The question arises whether Maggie Macartney, the bequest to her of

(1) 2 Ves. Jun. 367.
(2) L. R. 8 Eq. 165.
(3) (1874) L. R. 7 H. L. 53.
(4) 5 Ch. D. 163.
(5) (1876) 3 Ch. D. 688; (1877) 7 Ch. D. 345.
(6) (1886) 31 Ch. D. 466.

the 3000*l.* stock having failed, is entitled to any and, if any, what compensation from the legatees of the shares in Macartney, McElroy & Co., Limited, in respect of their interest in the shares of Malta Tramways, Limited.

That there is an equitable principle applicable to somewhat similar cases is well recognized. It is sometimes referred to as a principle of election, sometimes of compensation, sometimes—by those who prefer Scotch legal expressions to English—of approbation and reprobation. But it seems to me that, although these expressions are each of them applicable in the case of particular instances within the doctrine, the doctrine is wider. The simplest instance of it is where a testator purports to dispose of property to A., which in fact belongs not to the testator but to B., while B. himself takes benefits under the will. B. cannot accept the benefits given to him by the will unless he will surrender his right to his own property in favour of A. In this case the doctrine imposes the necessity of election. In the case of *Pickersgill* v. *Rodger* (1) it is treated as a doctrine of compensation; and see *Rogers* v. *Jones* (2), where Sir G. Jessel gave compensation to an amount not exceeding the benefits under the will. But these cases are only instances of the application of an equity which may arise under a great variety of circumstances. In *Pickersgill* v. *Rodger* (1) Sir G. Jessel thus states the principle (3): "'You are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation." What is the equity? If I may hazard a definition I should put it thus: "A volunteer under a will cannot take the benefit and at the same time wilfully defeat the expressed intentions of the testator." I say wilfully,

(1) 5 Ch. D. 163. (2) 3 Ch. D. 688; 7 Ch. D. 345.
(3) 5 Ch. D. 173.

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because in the case of *In re Lord Chesham* (1), before Chitty J., the case was held not within the rule because the volunteer was ready to do what he could to fulfil the intention of the testator. But it has been argued that the equity does not arise where the testator's intention is defeated by a volunteer who has no property in the subject of the testator's gift except such as he acquires under the will; that in the present case were the Malta Tramways, Limited, beneficiaries under the will they could not take without surrendering the 3000*l.*, but that the principle does not apply to the legatees of the shares in Macartney, McElroy & Co., Limited, because the interest they have in the stock is derived solely from the will. Now it is obvious that where two people claim the same property of a testator under his will, in the majority of cases the question must be to which of them the testator intended to give it, and a question of construction is raised to which the principle cannot apply. Here there is no doubt about the testator's intention, nor is there any doubt that under the will the legatees of the shares in Macartney, McElroy & Co. will acquire almost the whole of the beneficial interest in the stock which the testator undoubtedly gave to Maggie Macartney. It appears to me, therefore, that the present case comes within the principle, and I must give effect to it unless I am bound by authority to adopt the contrary view. It is said that *Wollaston* v. *King* (2), before James V.-C., is such an authority, and I must therefore examine it. The case of *Wollaston* v. *King* (2) is, as it appears to me, an authority only for the proposition that where an appointment by will under a power fails as creating a perpetuity and benefits are given by the will to the persons who benefit in respect of the appointed fund by failure of the appointment, no question of so-called election arises. There has been a difference of judicial opinion upon this point, but the view of James V.-C. was upheld in the Court of Appeal in *In re Nash* (3), confirming a judgment of Eve J. In *Wollaston* v. *King* (2) James V.-C. quotes the statement of the rule by the Master of the Rolls in *Whistler* v. *Webster* (4), which was as follows: "That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an

(1) 31 Ch. D. 466.
(2) L. R. 8 Eq. 165, 174.
(3) [1910] 1 Ch. 1.
(4) 2 Ves. Jun. 367, 370.

intention that such a thing shall take place." Chitty J. in *In re Lord Chesham* (1), says that James V.-C. cited this passage with approval, but, having regard to the Vice-Chancellor's own statement of the rule that the rule as to election " is to be applied as between a gift under a will and a claim dehors the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will," I think Chitty J. must have been mistaken, as the statement of the rule by James V.-C. appears to me to conflict with the statement of the Master of the Rolls. Chitty J. himself, however, must I think be taken to have agreed with *Whistler* v. *Webster*. (2) Farwell J. in *In re Oliver's Settlement* (3) says " the doctrine of election is a rule of equity by virtue of which the Court of Equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will," which I think is in accordance with the statement in *Whistler* v. *Webster* (2) and with the statement of Sir G. Jessel M.R. in *Pickersgill* v. *Rodger* (4), and in my opinion these statements accurately represent the doctrine. In my opinion, therefore, I am not precluded by authority from holding in accordance with my own judgment, and I decide that the legatees of the shares in Macartney, McElroy & Co., Limited, cannot take the benefit of their legacies without compensating Maggie Macartney in respect of the legacy of the stock, and that such a compensation is a charge upon their legacies.

1918. Jan. 11. A doubt having arisen as to the effect of the judgment, the two summonses came on again. An order had not been drawn up on the summons of Malta Tramways, Limited.

Howard Wright, for the plaintiff and the defendant Page.

Butcher, K.C., and *J. H. Stamp*, for Malta Tramways, Limited, asked that an order might be drawn up on their summons and that the executor might be directed to transfer the South Australian stock to that company.

NEVILLE J. You are entitled to that.

Ward Coldridge, K.C., and *F. K. Archer* (for *Tyldesley Jones*, serving with His Majesty's Forces), for Maggie Macartney. The

(1) 31 Ch. D. 466.
(2) 2 Ves. Jun. 367.
(3) [1905] 1 Ch. 191, 197.
(4) 5 Ch. D. 163.

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suggested compromise has so far failed. The effect of the judgment, it is submitted, is that the compensation is not limited to the shares of Macartney, McElroy & Co., but extend to all the benefits which the legatees of those shares take under the will.

Jenkins, K.C., and *Dighton Pollock*, for some of the legatees of the shares of Macartney, McElroy & Co. The bulk of the assets of Malta Tramways, Limited, will come into the pockets of the shareholders of Macartney, McElroy & Co., and in that way those shareholders will get the greater part of the 3000*l.* South Australian stock. Our contention on the judgment is that the compensation is limited to the shares in Macartney, McElroy & Co.

W. R. Sheldon and *J. H. Stamp*, for legatees in the same interest.

NEVILLE J. Whatever I may have said in the course of the judgment in discussing the question of compensation, I think it is clear on the strict grammatical construction of the judgment that the compensation is limited to the shares in Macartney, McElroy & Co., and to that I adhere. The charge is restricted to those shares.

Jenkins, K.C. The amount of the compensation will be the value of the South Australian stock at the date of the testator's death, and Maggie Macartney must herself contribute to the compensation in proportion to the shares of Macartney, McElroy & Co. bequeathed to her.

Ward Coldridge, K.C. That is not disputed.

Solicitors: *Budd, Johnson & Jecks; Foss, Bilbrough & Co.; G. W. Bower; Waterhouse & Co.; T. Cooper & Co.*

H. L. F.

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Nov. 27, 28, 29, 30; *Dec.* 5, 6, 7, 13.

[1917 L. 808.]

Local Government—Nuisance—Easement—Prescription—Sewage Farm —Noxious Trade Effluent—Borax in Solution—Injury to Farm—Statute of Limitations, 1623 (21 *Jac.* 1, *c.* 16)—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

The plaintiffs were a sanitary authority, and for more than twenty years before action brought the defendants had discharged into the plaintiffs' sewers the waste liquors from their borax works. This effluent contained borax in solution. The plaintiffs utilized part of the area under their control for a sewage farm on which various crops were raised, and they alleged that this noxious effluent had injuriously affected their farm and the crops thereon. There was evidence that the discharge from the defendants' works was intermittent and as a rule made at night, and neither the plaintiffs nor their predecessors had notice of it. No perceptible damage to the crops on the farm had been noticed prior to 1908. The defendants claimed a prescriptive right to continue the discharge of their effluent and denied that it was noxious or caused any injury to the farm. In an action by the plaintiffs claiming an injunction to restrain the defendants from continuing the discharge of this noxious chemical solution :—

Held, that as the enjoyment of the alleged easement had been secret and unknown and unsuspected by the plaintiffs or their predecessors, it was not of such a character as would establish a prescriptive right : *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852 ; *Union Lighterage Co.* v. *London Graving Dock Co.* [1901] 2 Ch. 300 ; [1902] 2 Ch. 557.

Held, further, that before time could commence to run under the Prescription Act there must have been an invasion of some legal right, and acts which were neither preventable nor actionable could not be relied upon to found an easement. Time therefore had not begun to run against the plaintiffs prior to 1908 : *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866) L. R. 1 Ch. 349.

Held, lastly, that on the established facts, confirmed by scientific evidence, the damage to the crops and farm was due to some injurious and poisonous ingredient attributable to the borax sent on to the farm by the defendants ; and the plaintiffs were entitled to the injunction claimed.

Quaere, whether it was competent for a sanitary authority, having regard to its statutory obligations to deal effectively with sewage, to make such a grant as was implied by the prescriptive right here contended for.

THE plaintiffs, as the sanitary authority for Liverpool, utilized some 200 acres of land at West Derby in the county of Lancaster,

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known as the West Derby Sewage Farm, on the banks of the river Alt, for the disposal of some of the sewage of the city. The defendants carried on business as borax manufacturers at the borax works, Albany Road, West Derby, in the same city, situated at a distance of three miles from the plaintiffs' sewage farm. The sewage entered the farm from two outfalls, the eastern and western. It was alleged in the statement of claim that the plaintiffs had recently discovered that the defendants had for some time past and still were wrongfully discharging from their works into the plaintiffs' sewers, or drains connected therewith, a noxious chemical solution, or chemical refuse, which found its way through the plaintiffs' sewers on to the sewage farm and prejudicially affected the application to the land of the sewage matter conveyed by the sewers, and in fact caused a nuisance or injury to the plaintiffs by rendering a considerable portion of the farm sterile and destroying the vegetation thereon.

The plaintiffs claimed an injunction restraining the defendants from discharging, or permitting to enter into any sewer of the plaintiffs, or any drain connected therewith, any noxious chemical solution or chemical refuse so as prejudicially to affect the application to land of the sewage matter conveyed along the plaintiffs' sewers, and to cause a nuisance or injury to the plaintiffs on their sewage farm; and damages.

The defendants denied the alleged nuisance or injury, and by paragraph 2 of their defence stated that they and their predecessors in occupation of the borax works had for forty years, alternatively for twenty years before action, enjoyed as of right and without interruption the right of discharging the trade effluent from their works, which at all material times had been of the same nature and composition, into the sewers of the plaintiffs and their predecessors, or the drains connected therewith, and so on to the sewage farm. They further alleged that the plaintiffs had at all material times known, or ought to have known, the nature and composition of the trade effluent and had been guilty of laches; and they pleaded the Statute of Limitations, 1623 (21 Jac. 1, c. 16), as a defence in respect of any loss or damage suffered prior to six years before the commencement of the action.

It appeared that in 1873 the West Derby Local Board, which was at that time the local sanitary authority for the district, had been

applied to by the predecessors in the defendants' business for leave to connect the drains of their borax works with the public sewer in Albany Road, but on July 30, 1873, the local board resolved that the proposal be not approved, and that the condensed water and contents of boilers and all other water not consisting of sewage proper must be passed off into the natural watercourses of the district.

In 1895 the West Derby urban district and the West Derby sewage system were taken over by the Liverpool Corporation. It was not until 1908 that injury to the sewage farm crops was perceived and was considered to be due to the sewage from the western outfall sewer. On May 17 the source of the contamination was reported to the committee having charge of the sewage farm, and the writ in the action was issued on May 22, 1917. Scientific and other witnesses were examined on both sides, and the various facts proved as well as the results to be deduced therefrom, sufficiently appear from the judgment of the Court.

Maugham, K.C., and *Courthope Wilson*, for the plaintiffs. The plaintiffs are claiming to stop the discharge, not of actual and bona fide sewage, but only of poisonous matter which under s. 7 of the Rivers Pollution Prevention Act, 1876, they are not compelled to accept. Light has been thrown upon the provisions of that section by two decisions. In the earlier, *Eastwood Brothers, Ld.* v. *Honley Urban Council* (1), the plaintiffs had acquired a prescriptive right of discharging their trade effluent, and that case only decided that the local authority were not entitled to cut off the plaintiffs' connection with the sewer in the absence of proof that the conditions of the proviso to s. 7 had not been complied with. On both those grounds that case is distinguishable from this. The later case, *Brook* v. *Meltham Urban Council* (2), shows that s. 7 gives a statutory right to discharge trade effluent into a sewer subject to compliance with certain conditions. In the present case the plaintiffs contend that the defendants have not complied with those conditions. The defendants assert a prescriptive right to discharge noxious matter into this sewer, but the evidence shows that any such user has been "clam" throughout.

(1) [1901] 1 Ch. 645. (2) [1908] 2 K. B. 780; affirmed [1909] A. C. 438.

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Further, the plaintiffs, being a public body with public duties to perform, could not have made such a grant as is here sought to be implied, by prescription: *Islington Vestry* v. *Hornsey Urban Council.* (1) Moreover, until the plaintiffs' farm had suffered injury the plaintiffs had no ground of complaint, and that alone would, in the circumstances, be fatal to the claim by the defendants of any prescriptive right: *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (2); *Sturges* v. *Bridgman.* (3)

Walter, K.C., *Clayton, K.C.*, and *J. Rutherford*, for the defendants. The character of the defendants' business and the mode of conducting it has been practically the same since 1872, when the local board constructed sewers and carried the sewage to their farm. We claim a prescriptive right by implied grant or under the Prescription Act, and the Court will struggle to find a legal origin for the right, if it can. Time began to run when the user was first made for an improper purpose to foul water. The right here claimed is a right to a watercourse, and so an easement within the statute. It was exercised openly and not clam, as in cases like *Sturges* v. *Bridgman.* (3) The plaintiffs, as owners of the servient tenement, had knowledge of, or the means of knowing, what was going on. There was no concealment: *Philipps* v. *Halliday* (4); *Wright* v. *Williams* (5); *Carlyon* v. *Lovering* (6); *Union Lighterage Co.* v. *London Graving Dock Co.* (7); *Islington Vestry* v. *Hornsey Urban Council* (1); Goddard on Easements, 7th ed. p. 248. No doubt presumption of a grant cannot arise unless the owner of the servient tenement was capable of making the grant. Here there was nothing ultra vires in the corporation consenting to take our effluent. They had power to take it under the Rivers Pollution Prevention Act, 1876, s. 7, subject to the proviso at the end of the section: *Eastwood Brothers, Ld.* v. *Honley Urban Council.* (8) We sent in our effluent before 1876, when we had no right to do it, and it was practically of the same character as now. An easement can be acquired and enjoyed without actual damage being done. When once a sani-

(1) [1900] 1 Ch. 695.
(2) L. R. 1 Ch. 349.
(3) 11 Ch. D. 852.
(4) [1891] A. C. 228.
(5) (1836) 1 M. & W. 77.
(6) (1857) 1 H. & N. 784, 797.
(7) [1901] 2 Ch. 300; [1902] 2 Ch. 557.
(8) [1901] 1 Ch. 645.

tary authority has sanctioned the connection being made with their sewers, they cannot afterwards interfere or cut off such communication: *Attorney-General* v. *Clerkenwell Vestry* (1); *Brown* v. *Dunstable Corporation*. (2) In the present case the damage, if any, must have been going on for years.

[EVE J. There must be preceptible damage before prescription can begin to run.]

In *Butterworth* v. *West Riding of Yorkshire Rivers Board* (3) it was assumed that a prescriptive right such as we claim here could be acquired.

Lastly, it has not been proved that the borax from our works has been the cause of the damage to the farm. No change has taken place in the character of the effluent. When there was a change of process introduced there was no increase of the pollution: *Baxendale* v. *McMurray*. (4) The onus of proof is on the plaintiffs: *Sevenoaks Rural Council* v. *Whitmore*. (5) Our evidence goes to show that the borax cannot have done the harm alleged. The defendants claim an easement to discharge their effluent on to the sewage farm irrespective of the sewers conveying that effluent to the point of discharge.

Maugham, K.C., in reply.

Cur. adv. vult.

Dec. 13. EVE J. The plaintiffs are the sanitary authority for the city of Liverpool, and as such have acquired and are using for the treatment and disposal of the sewage from part of the area under their control some 200 odd acres of land known as the West Derby Sewage Farm. The defendants carry on the business of manufacturers of borax within the area served by the farm and at a distance of some three miles therefrom. The farm has been used for many years past for growing the usual sewage farm crops—rye grass, turnips, mangolds, potatoes, kohl-rabi, cabbages and beet, and occasionally wheat and oats. In this action the plaintiffs claim that the defendants may be restrained by injunction from discharging into any sewer of the plaintiffs, or any drain communicating

(1) [1891] 3 Ch. 527.
(2) [1899] 2 Ch. 378.
(3) [1909] A. C. 45.
(4) (1867) L. R. 2 Ch. 790.
(5) (1901) *The Times*, May 2.

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therewith, any liquid so as prejudicially to affect the application to the said farm of the sewage matter conveyed thither along the sewers.

The defendants do not deny that for many years past they have been discharging from their works into the plaintiffs' sewers a trade effluent containing borax in solution, and they claim a prescriptive right to continue this discharge; they deny that the effluent is noxious or calculated prejudicially to affect the application of the sewage to the farm, or that it has caused any nuisance or injury to the plaintiffs, or destroyed any vegetation on or rendered any part of the farm sterile or unproductive.

The claim to a prescriptive right is raised in paragraph 2 of the defence, and for the greater part of the time occupied in the trial I and, I think, most of those engaged therein were under the impression that the defendants were about to prove, and, as I thought, by means of the branch drain from their works shown in red on one of the exhibited plans, a connection between their precipitating tanks and the plaintiffs' sewer, whereby the waste effluent had passed from the tanks to the sewer during the twenty or forty years mentioned in that paragraph. The claim advanced under s. 2 of the Prescription Act in the opening speech for the defence was to a watercourse, and it was not until the last witness in the case was put into the box that the true facts as to the disposal of the waste liquors were disclosed. It appears from his evidence that there have existed in different parts of the yard forming part of the works for a considerably longer time than twenty years past two gullies for carrying off surface and rain water. One of these gullies was connected at first by an old brick culvert, and later on by a nine-inch pipe, with the sewer in Derby Lane, and down this gully for more than twenty years the defendants poured their waste liquor which they emptied out of the tanks by means of a movable indiarubber syphon of a diameter of $1\frac{1}{2}$ inches, used for many purposes in the works, and not forming part of or attached to the tank, but merely employed to empty it just as a movable pump or buckets might have been similarly employed. About three years ago the use of this gully and drain was gradually discontinued, and the waste liquors were then run into what is called the new sump, into which rain water only had previously gone, and from this new sump they found their

way into the plaintiffs' sewer at the back of the houses in Albany Road by a route which is shown in red lines on the plan produced by Mr. Coghill. This gentleman stated, and I am content to assume it to be so, that the class and volume of trade carried on at the works, and the methods employed in it, have been practically the same since 1883; that there have been changes from time to time in the sources from which the raw material has been obtained, but that these changes have not materially altered the nature of the effluent, although at times they may have increased its volume owing to the more saline characteristics of the raw material; and he gave particulars of the total effluent run away, which over a considerable number of years worked out at an average of 100,000 gallons per annum, say 2000 gallons per week. Of late years this quantity has been discharged approximately each week, but before the war when the larger precipitating tanks holding 6000 gallons were in use the discharge took place at intervals of three weeks or a month. As a rule it has been made between 6 P.M. and midnight, the discharge being at the rate of about 1000 gallons per hour.

Upon these facts the first observation which occurs is that they do not establish the prescription which is pleaded, nor a state of things to which any questions were addressed in cross-examination of the plaintiffs' witnesses. But, apart from these considerations, how can this intermittent use, or rather misuse, of surface and rain water gullies and drains wholly upon and within the limits of the defendants' premises be made the foundation of a legal right to pour a poisonous waste liquor (for such ex hypothesi it must be, or no necessity for asserting the easement would exist) into the plaintiffs' sewers, unless notice is brought home to the plaintiffs of what the defendants were doing? There has been no assertion by conduct or otherwise on the part of the defendants that they claimed to do these things as of right, nor have they produced any evidence to prove any notice of their acts to the corporation or their predecessors, or established the existence of any state of things from which such notice could legitimately be inferred. On the contrary, I am quite satisfied on the evidence of Mr. Everett, who covers the period between 1879 and 1895, fortified by the resolution of July 30, 1873, that the plaintiffs' predecessors had no knowledge of the facts. No attempt has been made to fix the corporation with notice since 1895,

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and when the matter of injury to the farm was taken up by their responsible officials in 1908 their whole course of conduct was quite inconsistent with their having any notice of what was going on inside the defendants' works. If, then, the methods adopted by the defendants could in any circumstances have been made the foundation of a prescriptive right, a point upon which I express no opinion, I am satisfied that in the circumstances here disclosed the enjoyment has not been of such a character as to establish any such right. It has throughout been secret, not surreptitious or actively concealed from, but unknown to and unsuspected by the plaintiffs and their predecessors, and incapable, therefore, of being relied upon as the foundation of rights to their prejudice. As Thesiger L.J. says in the course of the judgment of the Court of Appeal in *Sturges* v. *Bridgman* (1), " Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be in the language of the civil law, nec vi, nec clam, nec precario ; for a man cannot, as a general rule, be said to consent or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive." See also *Union Lighterage Co.* v. *London Graving Dock Co.* (2)

Nor is this by any means the only answer to the defendants' claim to a prescriptive right. Before time can commence to run under the Prescription Act there must be an invasion of some legal right. Acts which are neither preventable nor actionable cannot be relied upon to found an easement. In order, therefore, to measure the prescriptive period it is necessary to fix the time when first a power to prevent or a right of action accrued to the person to whose prejudice the easement is alleged to exist. In the present case the corporation had no power to interfere by way of prevention, and no cause of action, so long as the effluent was innocuous, and, as it is proved that no palpable or perceptible damage was caused to the farm until the year 1908, the antecedent user of the sewers could not properly be relied on as carrying back the commencement of the qualifying period to the date when such non-preventable and non-actionable user originated. Until the user became actionable the basis of the

(1) 11 Ch. D. 863. (2) [1901] 2 Ch. 300 ; [1902] 2 Ch. 557.

presumption of the consent, that is to say, the power of preventing physically, or by action, was never present. On the facts here proved I do not think time had begun to run against the plaintiffs prior to 1908: see *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1) and *Sturges* v. *Bridgman*. (2)

Finally, I think in view of the statutory obligations imposed upon the sanitary authority to deal effectively with the sewage, it is, to say the least, very doubtful if it would be competent for the authority to make such a grant as the prescriptive right here contended for implies: see *Islington Vestry* v. *Hornsey Urban Council* (3); but this is a matter which may require further consideration, and inasmuch as I think there are sufficient grounds, apart from this one, for holding, as I do, that the defendants have not made out any prescriptive right, I do not further delay over this point. Before dealing with the issues of fact I only pause to say that the claim put forward in the final speech on behalf of the defendants that the easement claimed is the right to discharge the effluent on to the sewage farm and has nothing to do with the sewers by which it is conveyed to the point of discharge is, in my opinion, quite incapable of being sustained. The sewers are as much the property of the authority as is the farm; together they constitute the drainage system, and the right of action accrues to the authority as soon as the liquid invades the sewers. It is not competent for one party to ignore this fact and to select, so to speak, another location for the cause of action because he hopes thereby to evade the difficulties with which his access to such other location is beset. Nor, in my opinion, has the case of *Eastwood Brothers, Ld.* v. *Honley Urban Council* (4) any bearing upon the issues involved in this action.

I come then to those issues of fact, and the questions raised are, first, whether the defendants' effluent is noxious and calculated prejudicially to affect the application of the sewage to the plaintiffs' farm; and, secondly, has it in fact caused any nuisance or injury to the plaintiffs by destroying vegetation or making any part of their farm sterile and unproductive?

These questions are purely questions of fact depending upon the weight of the evidence upon the one side and upon the other.

(1) L. R. 1 Eq. 161; L. R. 1 Ch. 349.
(2) 11 Ch. D. 852, 863.
(3) [1900] 1 Ch. 695.
(4) [1901] 1 Ch. 645.

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There are two distinct branches of the evidence—first, what may be called the scientific evidence, and, secondly, the evidence which deals with the facts as they actually stand. In the case of *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1), to which I have already referred, the evidence was in an exactly similar condition, and Turner L.J. made a few observations thereon which so exactly reproduce what I wish to express that I venture to quote them. They are at p. 353 of the report when the case was before the Court of Appeal; he says: "Speaking with all possible respect to the scientific gentlemen who have given their evidence, and as to whom it is but just to say that they have dealt with the case most ably and most impartially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, the Court ought in these cases mainly to rely. I think so the more strongly in this particular case, because it is obvious that the scientific examinations which have been made . . . . must have depended much upon the state of circumstances which existed at the times when those investigations took place." And at the end of the paragraph he adds: "In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." I think those observations apply with great force to the present case.

Now what are the facts that have been established here? They are, first, that the defendants are, intermittently and at irregular intervals and hours, but for the most part at a time of day when the plaintiffs' sewers are not charged with the fullest amount of sewage which they convey at any time in the twenty-four hours, discharging into those sewers an effluent containing borax in solution to an amount far in excess of what is required to constitute the liquor a virulent poison to, and absolutely and immediately destructive of, any vegetation over which it might happen to be poured; secondly, that this effluent, diluted in its passage along the three miles of

(1) L. R. 1 Ch. 349, 353.

sewers which lie between the defendants' works and the plaintiffs' farm by admixture with some of the million and a half gallons, representing the average daily volume of sewage conveyed to the same outfall, reaches the plaintiffs' farm and is discharged thereon by the western outfall; thirdly, that for the last few years, and more particularly for the last two, perceptible and material damage has been done to the crops growing on the farm, and the fertility of the soil has been impaired by and in consequence of the application thereto of sewage coming from the western outfall; fourthly, that this damage and deterioration is not uniformly spread over the farm, or even over the parts of it treated with sewage from the western outfall, but is patchy and sporadic, and varies in intensity as it occurs near to or further removed from the distributing carrier; fifthly, that no similar damage or deterioration is perceptible in the area treated with sewage discharged on to the farm from the eastern outfall, and that the essential difference between the sewage discharged by the two outfalls is the presence in the one of the borax and the absence of it from the other; sixthly, that in soil treated with western outfall sewage and in sludge resulting from the discharge from that outfall borax soluble in water and under the citric acid test, and in a condition to be taken up by vegetation, together with borax in a relatively insoluble condition, is to be found in excessive quantities but is entirely absent from soil treated with eastern outfall sewage and in the sludge resulting from that outfall; seventhly, that there is no other injurious element present in excess in any of the soil or sludge analysed, and that the land is good land from the point of view of a practical farmer with forty years' experience, and, on analysis, every sample is shown to contain its due proportion of productive and nourishing constituents; eighthly, that on the plot marked M on the plan W.A.B.2 is by far the best soil from an agricultural point of view found at any of the ten spots from which samples were taken—that on parts of this plot, watered with western outfall sewage and manured with a dressing of sludge from that outfall, less than half a crop, in other parts less than a quarter of a crop and on some parts nothing at all was raised, not even weeds, and that, on analysis, the soil from the spot marked S.10 on plan W.A.B.2 was found to contain nearly three times as much borax, soluble and insoluble, as was found in any of the other

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samples; and, ninthly, that the only known source of origin for the borax is the defendants' works.

What are the irresistible conclusions to be drawn from these facts? That the damage to the crops and farm is due to some injurious and poisonous ingredient delivered there by the western outfall; that the delivery is intermittent and not constant in that the injury is sporadic and patchy; and that, in the absence of all traces of any other injurious or poisonous ingredients to account for the damage, it can only be attributed to the borax sent on to the farm by the defendants.

How far are these conclusions supported and confirmed or contradicted or modified by the scientific witnesses? Those called by the defendants do not agree with those called by the plaintiffs as to the true proportion of the soluble borax contained in the samples of soil, and it being, as they allege, common ground that the capacity of borax to injure is controlled by its solubility, they express the opinion that the damage cannot be attributed to the borax. One of them indeed went so far as to say that such a proposition was to his mind an "unthinkable" one, an observation which not unnaturally provoked the question whether he had found anything else to which the damage could possibly be attributed, and to this question his answer was that he had not done so and had not in fact tried to do so. The scientists who gave evidence on the part of the plaintiffs, men of great attainments, and in the case of Dr. Voelcker, a veteran investigator into matters of this kind of almost unequalled experience, were unanimously of opinion that the borax was the sole cause of the mischief; they rejected altogether the proposition that its injurious capacity was to be gauged only by the amount extracted in a soluble form by means of experimental, and in their view inadequate, washing, and as results of experiments of their own they fixed the minimum quantity of soluble borax capable of injuring vegetation at a much lower figure than the defendants' experts did. Considerable difficulty in adequately comparing the scientific results of the laboratory work on each side was introduced by reason of the defendants' witnesses having limited their investigations to the ascertainment of the soluble borax in the specimens analysed. Their reports only dealt with that isolated factor, and afforded the minimum of material for comparison with the reports made by the

plaintiffs' witnesses, and a corresponding dearth of information for cross-examining counsel. To this, I conclude, must be attributed the fact that there were so few suggestions made to the plaintiffs' experts of other causes to which the injury to the farm might be traced. It is true that it was put to them that the farm was overfed and supersaturated, a proposition which was disposed of when it was pointed out that if such were the case the damage would inevitably be found spread with some uniformity all over the farm and not in patches. It was also suggested that the drainings from the sooty roofs and tar-sprayed streets in the drainage area of 1600 acres might be responsible, but this somewhat far-fetched suggestion, coming from litigants who had neither taken the trouble to ascertain whether the surface drainage from roofs and streets was in fact carried to the farm at all, and who had deliberately abstained from analysing the effluent to ascertain whether it contained anything to justify such a suggestion, followed in the wake of the earlier one when it was disclosed that only a small part of such surface drainage ever gets to the farm. More worthy of serious consideration were the questions put to the plaintiffs' experts seeking for their explanation of certain phenomena disclosed in their investigations, such, for example, as the length of time which elapsed before the damage became perceptible, and the undoubted fact that crops of distinct qualities were found to be growing on soil which, according to the analysis, contained the same percentage of borax. These questions admittedly present problems of which at the moment the solution is not wholly apparent, but I may say that the first one is founded upon assumptions of fact which I should by no means accept as established were the inquiry in which I am engaged a scientific one. For the purposes of this case the loose, vague, and quite untested evidence as to the length of time during which the effluent has been discharged on to the farm, its quantity and quality, and the times of its discharge, has been taken as sufficiently accurate, but no scientific investigator worthy of the title would treat it that the consistency of the effluent in these respects was proved to demonstration by the testimony of one man who was there, it is true, but who had nothing to do with and knew nothing about the effluent, even though corroborated by the evidence of another man who was not there at all. The truth is that the defendants have produced no plausible

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explanation of the condition of the farm if it is not due to the borax, and, in my opinion, the conclusions deduced from the facts established are abundantly confirmed by the scientific evidence.

I hold, therefore, that the plaintiffs are entitled to the injunction they claim, and there will be an inquiry as to the damages they have sustained. The defendants must pay the costs of the action down to and including the judgment.

Solicitors: *F. Venn & Co., for E. R. Pickmere, Liverpool; Ince, Colt, Ince & Roscoe, for H. Forshaw & Hawkins, Liverpool.*

G. M.

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[1917 H. 434.]

War—Emergency Legislation—Trading with Enemy—Company—Winding up of Business—Creditor—Action commenced without Leave of Board of Trade—"Steps for the enforcement of the rights of any creditors"—Trading with the Enemy Amendment Act, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 7—*Pronouncement on Principles governing the Administration of the Trading with the Enemy Legislation.*

On its true construction and the intention of the Legislature, sub-s. 7 of s. 1 of the Trading with the Enemy Amendment Act, 1916, restricts, i.e., prevents without the leave of the Board of Trade, only the enforcement of admitted claims of creditors by way of execution or other form of process, and does not interfere with the ordinary course up to judgment of actions or other form of proceeding for the purpose of ascertaining or establishing disputed claims.

An action was brought by a British subject to recover from a British company, which had an enemy proprietary and a business in England which was being wound up under the Trading with the Enemy Amendment Act, 1916, a sum for salary alleged to be payable under an agreement of service, or, alternatively, damages for breach of the agreement. The company denied that the plaintiff was entitled to anything:—

Held, that the action was maintainable without the consent of the Board of Trade.

Semble, the plaintiff was not a "creditor" within s. 1, sub-s. 7.

Principles of administration of Trading with the Enemy Acts stated.

By an order of the Board of Trade, dated July 7, 1916, made under s. 1, sub-s. 1, of the Trading with the Enemy Amendment

Act, 1916, the business of the defendant company in England was required to be wound up, and a controller was appointed to supervise the carrying out of the order. The claim of the plaintiff in this action was, in substance, to recover arrears of salary, or, in the alternative, damages for alleged breach by the company of an agreement to employ him. The claim was rejected by the controller, and had throughout up to the trial been contested by the company. The writ was issued on February 23, 1917, without leave asked for or obtained from the Board of Trade, and the company, by way of preliminary objection to the hearing or further prosecution of the action, took the point that, the plaintiff having commenced his action without the permission of the Board of Trade, the writ was, by virtue of s. 1, sub-s. 7, of the statute (1), improperly issued, that the subsequent proceedings in the action had been incompetent, and that all further proceedings therein should be stayed. (2)

Galbraith, for plaintiff. Sub-s. 7 does not prevent an action of this sort for the ascertainment of rights; it only prevents the levying of execution without leave: *In re Farnol Eades Irvine & Co.* (3); *Ness* v. *O'Neil.* (4) Those cases were not upon the Act of 1916, but upon the Courts (Emergency Powers) Act, 1914. But the object of all these Acts is to prevent anything in the nature of execution, not to prevent ascertainment of rights. The statements made in those cases are relevant to this Act. The Act is something in the nature of punitive legislation on enemy subjects, and must be construed strictly in favour of the individual. The leave of the Board of Trade was not necessary.

(1) Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 7: "Where an order under this section has been made as respects the business carried on by any person, firm, or company, no bankruptcy petition or petition for sequestration or summary sequestration against such person or firm, or petition for the winding up of such company, shall be presented, or resolution for the winding up of such company passed, or steps for the enforcement of the rights of any creditors of the person, firm, or company taken, without the consent of the Board of Trade . . . ."

(2) Although a settlement of the plaintiff's claim by agreement was probable, and was in fact afterwards arrived at, the point, being regarded by the Board of Trade as important, was argued.

(3) [1915] 1 Ch. 22.

(4) [1916] 1 K. B. 706.

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Austen-Cartmell, and *J. C. Conway*, for defendant company. The point is not new, but has never been decided. There is much force in the view that sub-s. 7 prevents only execution, not ascertainment of rights. The early Courts (Emergency Powers) Acts were alio intuitu, and were passed for the benefit of British subjects, to prevent all litigation being thrown into confusion, to prevent the ordinary citizen having to pay money without the leave of the Court; they were relieving statutes. They are not in pari materia with the present Act. The Trading with the Enemy Acts were of an entirely penalizing character.

[YOUNGER J. It is a strange way of penalizing the enemy to prevent a British subject from bringing an action to get payment of his debt.]

The Trading with the Enemy Acts and the Courts (Emergency Powers) Acts use entirely different language. Sub-s. 7 includes proceedings as well for ascertaining rights as for enforcing them. If a creditor may not present a petition, he should not be allowed to bring an action. Sub-s. 7 is discussed in *In re W. Hagelberg Aktien-Gesellschaft.* (1)

[YOUNGER J. I think that the appointment of a receiver in a debenture-holder's action would be a "step for the enforcement of the rights of any creditors." How can it be said that the plaintiff, whose claim is absolutely denied by the company and who is said to be entitled to nothing at all, is a "creditor"?]

He would, if he were put in the witness-box, call himself that.

[YOUNGER J. But probably wrongly.]

And he sent in his claim for a liquidated sum. The Act uses the word "step," and not any legal term such as "proceeding."

[YOUNGER J. Can it be said that the plaintiff is doing more than asserting a claim sounding in damages?]

That is what he is doing. It would be unduly limiting the language of sub-s. 7 to say that it only restrains steps consequential on original steps. The words used show that it really extends to original steps.

Galbraith in reply.

Cur. adv. vult.

(1) [1916] 2 Ch. 510.

Dec. 5. YOUNGER J. (after stating the facts and saying that, as matters stood at the issue of the writ, it could not be properly said of the plaintiff, he thought, that he was then a creditor of the company, admitted or otherwise, for any sum at all). The Board of Trade regard the point raised by the preliminary objection as one of great importance in the effective administration of the Act in question, and now that it has been formally taken I have been pressed to give a decision upon it, even although as regards the actual claim made by this plaintiff a settlement by agreement is not now unlikely. The point has accordingly been fully argued by Mr. Galbraith on behalf of the plaintiff, and by Mr. Austen-Cartmell on behalf of the defendant company, and I now proceed to deal with it.

I have already had occasion to discuss different aspects of this sub-s. 7 of s. 1 of the Act in *In re W. Hagelberg Aktien-Gesellschaft* (1) and also in *In re Kastner & Co.* (2), and counsel on both sides have referred to the admittedly comprehensive terms of the enactment in support of the view of its effect for which they respectively contend. As is shown in *In re W. Hagelberg Aktien-Gesellschaft* (1), the sub-section in terms affects, at least to some extent, the vindication of claims of persons outside the winding up altogether; and Mr. Galbraith contends that a provision which curtails the rights of such persons ought not to receive a construction wider than the one that is strictly required by the language employed. Mr. Austen-Cartmell, on the other hand, relies upon the comprehensiveness of the language of the sub-section as an indication on the part of the Legislature that a winding up under the Act was to be left entirely undisturbed by litigation over any claims which in the opinion of the Board of Trade could not be conveniently or properly conducted during its continuance. In the presence of these conflicting views the only safe course would appear to be carefully to examine the language employed by the Legislature and endeavour to arrive at a conclusion as to its meaning. It may then be less hazardous to consider how far the conclusion so arrived at does or does not secure for the assets of a business being wound up such protection from outside interference as it may be presumed the Legislature intended to provide for them. The sub-section is

(1) [1916] 2 Ch. 503. (2) [1917] 1 Ch. 390.

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as follows : [His Lordship read down to the word " Board of Trade," and continued :] Dealing with the sub-section as a whole, it will be noticed that the bankruptcy petition and the petition for sequestration or summary sequestration as well as the petition or resolution for winding up—none of which may be presented or passed without the consent of the Board of Trade—have each of them this feature in common, that the order following upon such a petition, and the liquidation consequent upon a winding up resolution, in every case, in a very real sense, affects a change in the legal status of the person, firm, or company concerned in relation to his or their property, and serves to initiate a distribution thereof amongst creditors concerned. Further, it is noticeable that the forms of legal procedure referred to, namely, petitions for sequestration or for winding up, have this additional feature in common, that if they are to be followed by an order they must be preceded by a claim not open to serious dispute. Bearing these common features of these other proceedings in mind, it is significant that that which follows, and which, like the others, may not be taken without the consent of the Board of Trade, is described as a " step for the enforcement of the rights of any creditors of the person, firm, or company." The language is special. The proceeding is not described as the commencement or prosecution of an action for the ascertainment or establishment of such rights—language which would have been appropriate if the institution of such an action as the present were intended to be made dependent upon the consent of the Board of Trade. On the contrary, the proceeding is described as a step for the enforcement of these rights—that is to say, a proceeding which, if allowed, is strictly analogous in its immediate consequences to those previously described for the initiation of which also leave is required.

But the same result is, I think, reached by a consideration of the words themselves without assistance from their context. " Steps for the enforcement of the rights of any creditors " do not naturally signify more than steps for securing by way of realization or payment the satisfaction of a right which has either been established or is uncontested.

On construction, therefore—whether of the words in question in relation to the whole sub-section, or of the words standing alone

—I am of opinion that permission to institute the present action was not required.

And I am further of opinion, if I may now consider the point, that this construction of the section affords to the assets of a business being wound up all strictly necessary protection. It prevents them from being disturbed or broken up by any form of execution to which the Board of Trade in the interest of the controllership has not thought fit to agree, and I cannot see that more is necessary; and when I regard the apparently unnecessary restrictions imposed upon the assertion of legitimate claims which follow from the acceptance of Mr. Austen-Cartmell's contention, I am the more confirmed in this view, for his submission as to the effect of the sub-section involves this result—that any person who has rights or claims against a person, firm, or company concerned in a business being wound up under the Act is thereby prevented, unless the Board of Trade removes the ban, from having these claims established in due form of law, and none the less that the claimant may have a claim for the satisfaction of which no provision at all is made by the winding up. It is indeed startling enough that the section should, as I think it does, prevent such a claimant from enforcing without leave his claims even against any free assets he can find of the company, firm, or person concerned; but it would surely be inadmissible, unless so constrained by the clearest language, to hold that the sub-section also made dependent on the will of an executive department of the State the otherwise undoubted right of such a person to have free access to the Courts to have his rights established; especially is this so when it is borne in mind that to permit that access cannot materially prejudice the efficiency of the winding up, while to deny it might in many cases result in the claimant, owing to lapse of time or loss of evidence, being unable at the long last to establish his claim at all. If further support for the view I have expressed be required, it is, I think, supplied by a reference to the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), which, as explained by Warrington J. in *In re Farnol Eades Irvine & Co.* (1) and by the Court of Appeal in *Ness* v. *O'Neil* (2), supplies a striking analogy to the present sub-section, and confirms the conclusion I have otherwise arrived at, that all the Legislature is here concerned

(1) [1915] 1 Ch. 22. (2) [1916] 1 K. B. 706.

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to control is the enforcement of admitted claims by way of execution or other form of process, and that it is not purporting to interfere with the ordinary course up to judgment of actions or any other form of proceeding to which recourse may be had for the purpose of ascertaining or establishing such claims when they are in dispute.

I am conscious that this view of the section will not serve to supply certain deficiencies in the Act which its administration has already frequently disclosed. This decision affirms the power of the Board of Trade to prevent interference by a creditor with the assets of a business in the course of liquidation; but it furnishes a controller with no warrant to bring any creditor before the Court to have his claim adjudicated, nor does it open to the creditor, even with the consent of the Board of Trade, access to the Court in the winding up proceedings so that there the controller may at his instance be required either to admit his claim or to justify its rejection. Experience has shown that statutory provisions on these subjects would be of immense assistance in the working of the Act and the speedy and satisfactory completion of business liquidations thereby authorized, although it is true that the absence of such provisions has been made less marked than might have been expected by a readiness on the part of many claimants voluntarily to submit to a jurisdiction to which they could not be made amenable without their consent. It may be, as was indicated by Mr. Austen-Cartmell in his argument, that the Legislature, if it is recognized that they are not at present provided for, may turn its attention to these matters on some convenient occasion, and perhaps if the amendment of sub-s. 7 is then taken in hand the opportunity may be seized to exclude from its operation claims against persons, firms, or companies in relation to whose businesses restriction orders only, as distinct from winding up orders, have been made, and also claims against the person or firm or company concerned in reference to assets or in relation to any matters with which a business winding up order under the Act has no concern. These matters, however, are for the Legislature alone. As the statute stands I only decide that this present action is so far not affected by the provisions of s. 1, sub-s. 7, that no leave of the Board of Trade was required for its institution and that none is necessary for its prosecution up to and including the trial of the claim in dispute.

[Being asked, in response to a letter read by Mr. Galbraith, to make a pronouncement as to the action of the Board of Trade and the controllers in trading with the enemy matters, and in view of the feeling, widely entertained, that a Government department was unduly favouring alien enemies, Younger J. directed the action to be again put in the list.]

Dec. 10. YOUNGER J. With one of the objections taken by the company to the competence of the action I have already dealt; and since my judgment on that point the plaintiff's claim as a whole has been settled on terms of which I thoroughly approve, and with which, as I understand, the plaintiff is quite satisfied. In ordinary circumstances, therefore, the Court would have done with the action. At the request, however, of counsel on both sides, I have had it placed again in the paper this morning, that I might make some observations on two matters of importance in relation to the administration of the Trading with the Enemy Acts which emerged in the course of the proceedings, and which disclosed in the minds of the plaintiff and his solicitors the existence of what I fear is a somewhat widespread misconception as to the principles upon which their different functions under these Acts are discharged by the custodian, by the controllers, and by the Court. The misconceptions, shortly stated, are, first, that because of undue susceptibility for enemy interests there is, in the trading with the enemy administration, hesitation, or at least delay, in paying the debts of British creditors out of the vested property of their enemy debtors; and, secondly, that in the winding up of enemy businesses there is a disposition on the part of controllers to resist British claims upon these businesses in a way which imports undue consideration for their enemy owners. In ordinary circumstances I should not consider it any part of my judicial duty to seek to remove any such misconceptions, however widespread, except to the extent necessary for the decision of any particular case in which their existence was manifested. No one recognizes more fully than I that the only counsel of prudence for a judge to adopt is to confine himself strictly to the determination of the case in hand, and to avoid all superfluous discussion of topics which do not affect the result. I am the first, therefore, to recognize that the adoption of any other course in the

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present case lays that course open to legitimate and possibly well-founded criticism. I am nevertheless constrained, as the judge to whom the exercise of the jurisdiction of the Court in England under these Acts has been committed, and at the instance of counsel of great experience in these matters, Mr. Austen-Cartmell and Mr. Galbraith, to depart for once from this rule of prudence and to say something with regard to these misconceptions to which I have referred. I do so because I am satisfied that they cannot survive a just appreciation of the purpose of the statutes and of the responsibilities of the controllers, because I feel that their dissemination is injurious to the preservation of that national unity which in these days of stress and strain it is so necessary to maintain unimpaired, and because an opportunity for explaining publicly the principles upon which the administration of the Acts proceeds so rarely occurs that misconception with regard to them, if it once gains currency, may quickly become epidemic.

It is the fact that there is hesitation as a general rule in paying, at the present stage, the debts of creditors out of the property of their enemy debtors vested under the Act in the custodian. These debts can in no case be paid without the approval of both the custodian and the Court, and, although I have in no instance found myself in disagreement with the custodian on the subject, I accept full responsibility for the practice that, as a general rule, these debts are not being presently paid. The adoption of that practice is, however, in no way attributable to any undue susceptibility to enemy interests. No enemy can justly complain if his property is applied in payment of his debts. The practice was adopted for a very different reason, namely, that " the Trading with the Enemy Amendment Act, 1914, is not, primarily at least, an Act for the benefit of creditors at all. In the preamble, which recites that ' it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as " enemies ") in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies,' the payment to their creditors of

the debts of enemies out of such money and property is not mentioned or even referred to, and the secondary position which such creditors occupy under the Act is made very apparent by the provisions of s. 5, which prescribe the manner in which enemy property vested in the custodian under s. 4 shall be held and dealt with by him." It was in these words that I endeavoured to explain the purpose of the Act in *In re Fried Krupp Aktien-Gesellschaft.* (1) In this connection it is well known that funds consisting of British property in enemy countries are being everywhere vested in enemy custodians, and I conceive that it is only giving effect to the declared intention of Parliament to see to it that the corresponding funds in this country are as completely vested as possible. Every encouragement, therefore, is given to creditors to search out, and apply for vesting orders of, the property in this country of their enemy debtors, and such orders are freely made. But to dissipate at this stage of the war that property when it is vested, even in payment of debts, would largely neutralize the great object of the Act, and, accordingly, payments for that purpose are not ordinarily immediately authorized. This is not, however, to say that such payments will not in due course be made. On the contrary, the usual vesting order contains provisions under which, before any enemy property is actually returned to its enemy owner,—if that at the conclusion of the war is to be its final destination—his debts here may be ascertained, so that, in default of any other provision for their liquidation in the treaty of peace, they may be paid out of the vested property. Nor even in the meantime do we ignore the case of any creditor the postponement of whose claims would involve exceptional hardship to himself; provision is in every such case where it is practicable made for the immediate satisfaction of such claims. It is indeed the anxious desire of the custodian and, I may say, of the Court also, to administer these Acts without preventable hardship to any British interest. Thus it is that vesting orders are most carefully framed so as to avoid any risk of debts due by British debtors to enemies being paid twice over, and arrangements are devised to meet cases where immediate payment of these debts even to the custodian would dislocate business or cause excessive inconvenience. In the result it has been to me a great satisfaction to note in the numerous cases

(1) [1916] 2 Ch. 194, 198.

YOUNGER J. 1917 HOLT v. A. E. G. ELECTRIC COMPANY.

which have come before me a remarkable readiness on the part both of debtors and creditors, as soon as they appreciated its purpose, to co-operate in the successful working of the Act with a most praiseworthy willingness to subordinate their individual interests to the national cause. I have not found that any individual applicant or respondent, whatever may have been his views at the outset, has remained under any such misconception as that with which I am now dealing after the case in which he was interested has been disposed of, and I am not without hope that this explanation, summary as it has necessarily been, may remove that misconception from the minds of those who have not had the opportunity of testing the working of the Act for themselves.

As to the second misconception to which I have referred, it is true that the controllers, appointed by the Board of Trade to wind up enemy businesses, test most carefully the claims against the owners of these businesses, which under the Act they are required to discharge out of the proceeds of realization. But it is surely little short of an insult to describe as an undue consideration for the enemy owners of these businesses such action on their part, action that has never in my experience of the controllers been more than an effective discharge of a plain and obvious duty. The owners of the businesses are not always enemies, but, even if they were, no creditor surely expects that his claims, however unfounded or inflated, against these businesses are to be allowed merely because the owners are enemies. Indeed, the fact that the enemy owners are not in many cases in attendance to meet or to assist a controller in dealing with the claims against their businesses imposes upon him a heavier responsibility than would otherwise rest upon him, and I conceive it to be his duty—and when applied to I have always so laid it down—that he must not without recourse to the Court admit any claim which, so far as he can see, the enemy would either desire or be able to resist if he were here himself to be heard. Many cases of difficulty which have arisen in the liquidation of enemy businesses under the Act of 1916 have been, at the instance of the Board of Trade, referred by the controllers to me. I can recall no instance in which the action of the controller has not been fair, just, and reasonable. The controllers under the Act of 1916 are set to do justice to all manner of people in relation to the claims with which they have to deal. To

them it is, as it ought to be, nothing that the claimant is a friend and the debtor an enemy. Justice demands the same treatment for both. In this the controllers adopt the standard of this Court. It may not be possible to conceive of a higher ideal, but no truly patriotic Briton who considers for a moment the issues involved would tolerate the adoption of a lower in this form of official liquidation.

Solicitors: *Haslewood, Hare & Co., for March, Pearson & Akenhead, Manchester; Michael Abrahams, Sons & Co.*

A. L.

In re DIECKMANN (AN ENEMY).

[1917 D. 458.]

War—Emergency Legislation—Enemy Business wound up—Lease of Business Premises—Landlord's Claim for Future Rent—Trading with the Enemy Amendment Act, 1916 (*5 & 6 Geo. 5, c. 105*), *s. 1, sub-s. 3.*

Where a business is wound up under the Trading with the Enemy Amendment Act, 1916, and a lease of the business premises remains unexpired when the winding up is complete, the lessor, being paid all rent due to date and the covenants having been performed, has no right against the controller or the balance of assets in his hands in respect of future rent or performance of covenants. They are not present debts or liabilities within the meaning of s. 1, sub-s. 3, for which alone the controller is responsible. If a lease is beneficial, it is a controller's duty to realize it. If it is onerous, it may be his duty to realize it, if possible. If realization is impossible, it is ordinarily proper for him to offer the lessor fair terms (which, normally, will not exceed bankruptcy terms) for surrender of the lease. If the lessor refuses to accept a surrender, it is, in an ordinary case, the controller's duty to leave the lessor to whatever rights and remedies he may have against the lessee under the ordinary law.

THE facts were stated by Younger J. as follows:—

"This summons is taken out by Mr. J. S. Mallam, who, by an order of the Board of Trade dated August 11, 1916, made under the powers conferred upon them by the Trading with the Enemy Amendment Act, 1916, for the winding up of the business carried on in the United Kingdom by Ernest Dieckmann, was duly appointed controller

YOUNGER J. 1917 DIECKMANN, *In re.*

to control and supervise the carrying out of the order and to conduct the winding up of the business. The summons asks what steps the applicant as such controller ought to take in regard to the premises No. 2, Gresham Street, E.C., at which the business was carried on, and that in particular it may be determined what is the liability (if any) of the assets of the business or of the controller under or in respect of the lease of the premises dated March 11, 1915, and made between the Land and House Property Corporation, Limited, of the one part and Ernest Dieckmann of the other part.

"The summons raises specifically a question which has frequently emerged in winding up proceedings under this Act. It has not hitherto been necessary to decide it. On the present occasion, however, the lessors have submitted to the jurisdiction and have appeared to the summons and concur with the controller in asking that the question, a somewhat vexed one, be now set at rest so far at least as this Court is concerned.

"By the lease in question the respondents, the Land and House Property Corporation, Limited, demised to E. Dieckmann the warehouse and premises in question for the term of nine and a half years from March 25, 1915, determinable by the tenant on certain terms on June 24, 1918. The rent reserved is 450*l.* a year, and the lease is subject to repairing and other covenants and conditions on the part of the lessee to be performed and observed. The premises were taken by E. Dieckmann for the purposes of his business of a lace and blouse warehouseman and were occupied by him for the purposes of that business. E. Dieckmann is an enemy subject, and, having been repatriated to Germany, is now an enemy as well. The winding up of the business under the Board of Trade order has been practically completed. Provision has been made for payment of the debts of all the present creditors, and there is an ascertained balance in the controller's hands. The winding up has been completed without it having been necessary for the controller to transgress in any way the covenants of the lease. The rent up to date has been paid, and the question which has now to be determined is whether there are any further claims in respect of future rent reserved by, and in respect of the performance by the lessee in the future of the covenants and conditions contained in, the lease which the lessors can require the controller under the Act to

recognize and admit against the assets of the business in his hands."

Austen-Cartmell, for the controller. The landlord's claim is the only one which is not provided for by the Trading with the Enemy Amendment Act, 1916. He is not a creditor for future rent. There is no right at all, under the Act, to future rent, whether the lessee be a company, a firm, or an individual. By s. 1, sub-s. 2, the Board of Trade may confer on the controller powers, not rights—administrative powers which are expressed in bankruptcy terms. Sub-s. 4 strongly supports the controller's view: "liabilities" there mean present liabilities to persons who can properly be called creditors. The landlord is not a "creditor" in respect of future rent at all. The Act gives him no right to come in. The controller has no power to disclaim a lease. Future rent is not in any sense a "debt" of the business when the controllership is closed and the controller released under sub-s. 5. That is sufficient for the present purpose.

But though that is so, and though on principle a lessor has no absolute rights as to the lessee's liabilities to him which have not actually accrued, yet the Court can, and in a proper case will authorize the controller to offer the landlord, if he will accept a surrender of the lease, bankruptcy terms, namely, two quarters' rent, cost of repairs, and a sum for the rest of the term equal to the probable diminution of rent: *Ex parte Blake* (1), *In re Carruthers* (2); *Ex parte Llynvi Coal and Iron Co.* (3) In ordinary cases, whether the business is solvent or not, the controller is justified in offering the lessor bankruptcy terms.

C. J. Mathew, K.C., and *H. J. Mackay*, for lessor. The case much more nearly resembles that of a voluntary liquidation than that of a bankruptcy. The proper claim of the landlord against a solvent estate is the whole of the rent: *Oppenheimer* v. *British and Foreign Exchange and Investment Bank.* (4) There is a legitimate claim for the whole of the rent, the only question is how it is to be given effect to: *Gooch* v. *London Banking Association* (5); *Craig's Claim* (6);

(1) (1879) 11 Ch. D. 572.
(2) (1895) 2 Mans. 172.
(3) (1871) L. R. 7 Ch. 28.
(4) (1877) 6 Ch. D. 744.
(5) (1886) 32 Ch. D. 41.
(6) [1895] 1 Ch. 267.

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In re New Oriental Bank Corporation (No. 2) (1); *Hardy* v. *Fothergill* (2); *Horsey's Claim* (3); *In re Haytor Granite Co.* (4)

[YOUNGER J. The essential difference between those cases and this is that here the lessee is left, figuratively, in full vigour—he is still, commercially, in existence.]

Commercially he is dead though, as an individual, alive; the intention of the Legislature was to take away the business—to entirely stop the business. A trustee in bankruptcy can compel a landlord to accept a surrender of the lease; the liquidator in a company winding up cannot; therefore the measure of damages is different in the two cases—compulsory as against voluntary. The present is, in effect, the voluntary winding up of a solvent company. The landlord is entitled to claim for the whole of his damages. His strict right is to require the controller to comply with the terms of the lease for the remaining seven years.

[YOUNGER J. It has been held that a landlord's claim for future rent is not a present liability under s. 158 of the Companies Act, 1862.]

Sect. 158 is now s. 206 of the Companies (Consolidation) Act, 1908. It is quite contrary to elementary justice that the landlord is entitled to nothing, as the controller says. The controller's argument amounts to this—that the Act of 1916 cuts out a right which is recognized in every other similar procedure, voluntary or compulsory winding up or bankruptcy.

[YOUNGER J. In cases under the Act the business can, and does, come to an end, whether the lease continues or not. The principle of *In re Panther Lead Co.* (5) will probably satisfy most controllers and lessors.]

Authorities are not of much use in the new conditions prevailing under the Act. There is no analogy here to the case of a trustee in bankruptcy. The Act stands alone and must be construed by itself. The analogy of a company winding up should be followed, where the landlord can say to the liquidator that the terms offered do not satisfy him, and the liquidator then says he will go to the Court and ask what are fair terms for him to offer the landlord so

(1) [1895] 1 Ch. 753.
(2) (1888) 13 App. Cas. 351.
(3) (1868) L. R. 5 Eq. 561.
(4) (1865) L. R. 1 Ch. 77.
(5) [1896] 1 Ch. 978.

as to induce him to accept a surrender of the lease. The lessor cannot compel the controller, nor can the controller compel him.

[YOUNGER J. This argument involves that the controllership is to be kept open indefinitely.]

Not at all; but the controller must provide for his liability for future rent before he hands over the money in his hands to the custodian and closes the controllership.

Austen-Cartmell in reply. There are no rights on either side, one way or the other, either in the controller or in the lessor; but from an administrative point of view bankruptcy terms are proper. The true principle is that the controller is a stranger to the lessor so soon as the habitat of the business, the place where it has been carried on, is no longer wanted, and thenceforth there is no further debt. The controller only discharges debts due up to the end of his occupation.

Cur. adv. vult.

Dec. 19. YOUNGER J. (after stating the facts). In approaching the consideration of this question it is, I think, very necessary to bear clearly in mind one circumstance that is often overlooked inherent in the winding up of a business under this Act. The completion of such a winding up in no way of itself extinguishes, nor indeed does it necessarily in any way even affect, the liability of the owner of the business under the covenants of any lease of the business premises which may stand in his name. If the owner of such a business were himself to wind it up, sell his business stock, and pay his business debts, leaving his leasehold premises undealt with, this would clearly be the case. The fact that under the Act such winding up is compulsory, and is or may be carried out by a controller, makes, I think, no distinction in this respect. Very different, however, is the position of a lessor after the bankruptcy of his lessee, if the lessee be an individual, or after its liquidation and dissolution, if the lessee be a company. In each of these cases the completion of the process of liquidation involves the entire extinction of all liability under the lease on the part either of the individual or of the company. In the case, therefore, whether of a bankruptcy or of a liquidation—which, differing in their incidents, are both alike in this, that they seek to provide once and for all for an equitable distribution of the debtor's or the

YOUNGER J. 1917 DIECKMANN, *In re.*

company's assets amongst *all* the creditors—it is essential that provision be made for the satisfaction in some form or other of (amongst other claims) that of a landlord for the future rent of premises held by the debtor or company on terms favourable to the landlord. For the reason given, however, there is no similar necessity to make any such provision in the case of a winding up of a business under this Act, and for a like reason any analogy drawn from the rules applicable in the case of bankruptcy or liquidation of the tenant—and that supposed analogy was copiously invoked in argument—must be applied with much reserve.

The sub-sections of the Act which apply are sub-ss. 3 and 5 of s. 1. [His Lordship read sub-s. 3 (1) and continued :] Is this claim to future rent a debt or liability within the meaning of that sub-section ? It is plainly not a present debt, and the cases under s. 206 of the Companies (Consolidation) Act, 1908—a section much more comprehensive than that here in question—show that it cannot be regarded as a present liability even if, beyond the point indicated in *In re Kastner & Co.* (2) the word " liabilities " in this sub-section is more comprehensive than the word " debts." And there is no indication in either this or any other sub-section of the Act that, if at the time of the division amongst the creditors

(1) Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 3 : " The distribution of any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies ; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct : Provided that any sums or other property which had a state of war not existed would have been payable or transferable under this section to enemies, whether as creditors or otherwise, shall be paid or transferred to the custodian under the Trading with the Enemy Amendment Act, 1914, to be dealt with by him in like manner as money paid to him under that Act."

(2) [1917] 1 Ch. 390.

directed by the Act there exist claims in the future which may materialise, provision is to be made for meeting them; on the contrary, the statute seems to contemplate immediate distribution among present claimants, and, after accounting to the owner of the business for any balance (see *In re Fr. Meyers Sohn, Ld.* (1)), an immediate discharge by the Board of Trade of the controller. In my opinion, that which, on the face of the statute, would in this respect appear to be its effect is its real intention. The whole purpose of the Act is to extinguish speedily and completely those businesses which are directed to be wound up as being obnoxious to it, and the Act, in a somewhat rough and ready fashion, it may be admitted, has indicated the persons (so-called creditors of the business) whose claims the controller is alone to recognize out of the business assets, leaving these creditors, if their claims be not completely satisfied, and all other creditors of the owner of the business whose claims are not even touched, to their original rights against the owner and any other property of his which may be capable of being made under the ordinary law available to meet them.

In my opinion, therefore, in the present case, the rent under the lease having been paid up to date and no present claim being presently competent to the lessors under any of the covenants in the lease, they are not in a position to require the controller to recognize or admit against the assets in his hands any further claim on their part, and I think that the controller, having completed the winding up of the business, is at liberty to hand over these premises to any representative of Dieckmann he can find, or, if he can find none, to leave them. So far as the respondents are concerned, he is, I think, under no duty to remain there, and, if he departs leaving the key in the door, their claim is simply that which they would have had against Dieckmann himself had he, before he left for Germany, himself carried out the winding up of his business and himself left his business premises unattended. The opposite view of the statute is rested upon a reference to cases in the liquidation of companies in which a liquidator has been prevented from distributing assets amongst contributories until such claims as those of the present respondents against the company have been satisfied or secured. In my opinion, however, for reasons I have given, there is no real

(1) [1917] 2 Ch. 201.

YOUNGER J. 1917 DIECKMANN, *In re.*

analogy between the two cases, and it is, I think, quite impossible to hold that persons in the position of these respondents are entitled in any way to hinder the machinery of the winding up by bringing forward any such future claims as their present claims are.

It is, however, said that this strict view of the Act is unjust to lessors, who in a business sense, if not in law, are in fact deeply prejudiced by such a compulsory winding up of their tenant's business as is authorized by this Act. I realize the force of that view, and, within limits, I think controllers are bound to give effect to it. If the leasehold property of a business is valuable, no difficulty of course arises. It is the duty of the controller to sell and assign it. If it be onerous, I conceive it may still be his duty to realize it, even if, in order to obtain an assignee, he may have to make instead of receive payment. Further, if no assignment is possible, it is, I think, proper for the controller in an ordinary case to approach the landlord and see whether he will be willing to accept a surrender on terms which in the circumstances appear fair to the controller, not, however, normally exceeding those terms for which in a bankruptcy a trustee admits a bankrupt's lessor to prove after he has disclaimed the bankrupt's lease. All this, as it seems to me, would be as right and proper in the case of a winding up under this Act as Romer J. in *In re Panther Lead Co.* (1) declared a similar attitude on the part of a liquidator to the company's lessor to be. The other creditors of the business could have no proper objection to such a course: the disposal of the business premises is a very essential incident in the complete winding up of a business carried on there. The owner is not entitled to object: with the loss of his business the premises would be of little, if any, advantage to him, and the controller's arrangement would merely limit, by satisfying on reasonable terms, his landlord's continuing claims against him. And lastly, such a transaction would, in my opinion, very fully complete the purpose of Parliament in relation to the winding up of the business with which the pre ises were bound up. But if, in response to such a proposal, the lessor refuses to accept a surrender, then in my opinion it is the duty of a controller in any ordinary case to relegate him to his legal rights against the enemy owner, and, having discharged all present claims under the lease, to leave the lessor to

(1) [1896] 1 Ch. 978.

obtain satisfaction of all future claims by proceedings against the enemy owner himself. In the present case the controller has made proposals to the respondents for a surrender of the tenancy which are, I think, reasonable and which ought to be adhered to. If the respondents accept these proposals, good and well. If on consideration they refuse them, then I direct the controller to reject any further demand by them against the assets in his hands in respect of future claims under Dieckmann's lease.

YOUNGER J. 1917 DIECKMANN, *In re.*

Solicitors: *Johnson, Weatherall & Sturt; Smythe & Brettell.*

A. L.

In re WERNHER. WERNHER *v.* BEIT.

YOUNGER J. 1917 *July* 11, 18, 19; *Oct.* 24. 1918 *Jan.* 15.

[1917 W. 527.]

Will—Soldier on Active Service—Infancy—Exercise of Power of Appointment—Validity—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 7, 11.

Sect. 7 of the Wills Act, 1837, enacts that no will made by any person under twenty-one shall be valid. Sect. 11 provides that any soldier being in actual military service may dispose of his personal estate as he might have done before the Act. Upon the true construction of the Act, s. 11 does not limit the generality of s. 7.

Accordingly, under the Act, no will made by an infant soldier is valid.

But it has been the practice since the Act to admit infant soldiers' wills of personalty to probate.

And, though that practice is not justified by *In the Goods of Farquhar* (1846) 4 Notes of Cases 651, upon which it is based, yet it has been recognized, and, in accordance with it, probate of an infant soldier's will must be treated as conclusive that he had testamentary capacity, and the will, while the probate remains unrevoked, must be treated as valid.

An infant soldier, having before the Act capacity to dispose by will of his own personalty, had power to exercise a general power of appointment over personalty by will.

Assuming that the Act did not take away an infant soldier's capacity to make a will, it did not take away his power to exercise a general power of appointment by will.

A. P. W., having under his father's will a general power to appoint 1,000,000*l.* by will, made a will in 1916, when on active service,

YOUNGER J.

1918

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purporting to exercise the power, and was killed in action an infant between nineteen and twenty. The will was admitted to probate:—

Held, on the hypothesis that the will was valid (as to which, under the Wills Act, 1837, *quaere*), that it operated to exercise the power.

Principle of *In re Price* [1900] 1 Ch. 442 and statement by Lord St. Leonards (Sugden on Powers, 8th ed. p. 178) applied.

SUMMONS to determine whether the will of an infant soldier on active service operated to exercise a general testamentary power of appointment.

The facts were thus stated by Younger J.: Sir Julius Wernher, by his will dated December 23, 1911, amongst many legacies and other gifts of large amount bequeathed to his trustees a sum of 1,000,000*l.*, referred to in the will and herein as "the third settled legacy," upon trust for investment, declaring that, so long as his son Alexander Piggott Wernher should be living and under the age of twenty-six years the income of the whole of the sum of 1,000,000*l.* constituting the legacy and of the investments from time to time representing it, and so long as the same son should be living and above the age of twenty-six years but under the age of thirty years the income of one moiety of that third settled legacy, should sink into and form part of his residuary estate. And he declared that his trustees should, after the attainment by his son of the age of twenty-six years, pay the income of one moiety of the third settled legacy to him until he should attain the age of thirty years or previously die, and that after the attainment by his son of the age of thirty years they should pay the income of the third settled legacy to him for the remainder of his life. And the testator proceeded as follows: "And I declare that after the death of my said son Alexander Piggott Wernher my trustees or trustee shall stand possessed of the third settled legacy and the income thereof in trust for such person or persons and for such purposes as the said Alexander Piggott Wernher shall by will or codicil appoint and in default of appointment and so far as no such appointment shall extend the third settled legacy shall sink into and form part of my residuary estate." By the conjoint operation of his will and of a codicil thereto dated March 15, 1912, any further sums falling into the residue of Sir Julius Wernher's estate will devolve as to two twenty-fourths upon the defendants King Edward's Hospital Fund for

London, as to thirteen twenty-fourths upon the plaintiff Lady Wernher, and as to nine twenty-fourths upon Sir Julius' second son, the plaintiff Major Harold Augustus Wernher. That son's interest in his share of residue, however, does not vest in him until he attains the age of thirty years. In the event of his earlier death leaving issue surviving him, that issue on attaining twenty-one, or in case of females on marriage, will take his share by way of substitution, and if more than one equally between them. Major Wernher is now twenty-five. He is married, but there is at present no issue of his marriage. Sir Julius Wernher died on May 21, 1912, and his will and codicil were in due course proved by two of the plaintiffs and by the defendants Mr. Beit and Mr. Pollen. Alexander Piggott Wernher by his will dated July 14, 1916, and made by him when "in actual military service" within the meaning of s. 11 of the Wills Act, 1837, gave pecuniary legacies amounting in all to 328,000*l.* Amongst these is a legacy of 50,000*l.* to the defendant Ernest Trevor McDougal. He devised and bequeathed "all the real and personal estate whatsoever and wheresoever of or to which I shall at my death be seised possessed or entitled or over which I shall at my death have a general power of appointment or disposition by will"; and, except so far as the same was not otherwise thereby disposed of, he gave it, in the events which have happened, unto and to the use of his brother the plaintiff Harold Augustus Wernher. He died, being killed in action, in September, 1916, when an infant between nineteen and twenty. He was a bachelor at his death. Probate of his will was on February 7, 1917, granted to the plaintiffs, three of the executors therein named, power being reserved to the fourth executor, the defendant Stephen Hungerford Pollen, to prove. He has not yet done so. The infant testator's own personal estate amounted to about 400*l.* only. He was not possessed of any real estate. The third settled legacy was in substance the only property dealt with by the will.

C. J. Mathew, K.C., and *J. W. Holmes*, for executors of infant's will.

P. O. Lawrence, K.C., and *Harman*, for beneficiaries under it. The infant's will was admitted to probate on the ground that he was a soldier on active service, and so was valid though he was an

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infant: Wills Act, 1837, s. 11. It is a will within the law of England, and in a Court of construction must be held to be a will, and no one can be heard to say here that it is not. It is both "made in accordance with the law of England" and "recognized by the law of England" as a will: *In re Wilkinson's Settlement.* (1) Even if it were executed otherwise than by the law of England, it could call in aid s. 27, which has a wide operation, and is not limited to wills executed in accordance with the law of England and applies to any will recognized by the law as such. Thus, there is here a perfectly valid will, exercising a general power of appointment. The case for these defendants is unanswerable, unless it can be shown that the donor of the power meant by the word "will" something different from what there is here. The Wills Act will be said to be against these defendants' contention. Before that Act, clearly an infant could exercise a power of appointment of personal estate: Sugden on Powers, 8th ed. pp. 177, 178, and Appendix, p. 910. The will here is within the donor's description of the instrument which he required for the exercise of the power. It derives its power, not from the law, but from what the donor of the power has said—from the terms of the creation of the power: Sugden on Powers, 8th ed. Appendix, p. 910. There is no inherent disability in an infant to exercise a power: *In re Cardross' Settlement.* (2) He can execute a testator's mandate in spite of his disability of infancy. The incapacity, if any, to exercise the power arises merely by virtue of s. 7 of the Wills Act, which says that no will made by an infant shall be valid; the incapacity to exercise a power of appointment is merely dependent on the incapacity to make a will; if, therefore, the incapacity to make a will is got rid of, the incapacity to exercise the power of appointment is gone too: *In re Cardross' Settlement* (2); *In re D'Angibau* (3). The power here is "in gross" within the meaning of the second of the three classes defined in *In re D'Angibau* (4) and is equivalent, in Jessel M.R.'s view, to a collateral power. The general principle contained in the judgments of *In re D'Angibau* (3) covers this case. It was not present to the minds of the judges there that an infant soldier could make a will under the Wills Act. Where, as here, there is what is in law a "will," all the conditions which

(1) [1917] 1 Ch. 620, 627.
(2) (1878) 7 Ch. D. 728.
(3) (1880) 15 Ch. D. 228.
(4) 15 Ch. D. 232.

the donor of the power required for its exercise are fulfilled. Only personalty is here being dealt with. It is not suggested that a will of realty would be valid. It is true that s. 11 of the Wills Act speaks only of a will of "personal estate," but it would be taking too narrow a view to confine the expression to property which vests in the executor "as such." The existence of any will which is valid to dispose of the personal estate of the donee is the test of the validity of the exercise of the power. Sect. 11 of the Wills Act preserves the rights of soldiers and sailors as they existed before the Act. Before the Act an infant soldier or sailor could make a will of personal estate. There is no authority to show that, infant or adult, he could not on the field of battle exercise a testamentary power of appointment except by a will executed with the formalities required by law from other persons. This infant's will is executed in accordance with the requirements of law, being attested by two witnesses. He has executed an instrument by which he can and has disposed of his own personal estate, and it is an instrument by which he can exercise a mandate to dispose of another person's personalty: *D'Huart* v. *Harkness* (1); *In re Price* (2); *In re Simpson* (3); *In re Wilkinson's Settlement* (4); *In the Goods of Alexander.* (5) A will executed in accordance with the law of the domicil is valid in this country: Dicey's Conflict of Laws, 2nd ed. p. 693. As a domiciled foreigner is outside the Wills Act, so is an infant soldier quoad personal estate. Mobilia sequuntur personam, in the case of a foreigner. An infant soldier can make a will apart from the Act. A person may have capacity to exercise a power though he does not possess testamentary capacity by the law of his domicil: Dicey's Conflict of Laws, 2nd ed. p. 687. Sect. 10 of the Act need not be regarded one way or the other. Once there is a will admitted to probate, it is a will according to the law of this country—and probate is conclusive: *Douglas* v. *Cooper* (6); *Lord Townshend* v. *Windham* (7)—and, it being an instrument which fits the terms of the creation of the power, is a valid exercise of it and the appointment is good.

(1) (1865) 34 Beav. 324.
(2) [1900] 1 Ch. 442.
(3) [1916] 1 Ch. 502.
(4) [1917] 1 Ch. 620.
(5) (1860) 29 L. J. (P. & M.) 93.
(6) (1834) 3 My. & K. 378.
(7) (1750) 2 Ves. Sen. 1, 10.

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Upjohn, K.C., and *Galbraith*, for trustees of Sir J. Wernher's will. In offering arguments against the validity of the appointment, these defendants desire, not that it should not be given effect to, but to assist the Court; they wish the infant's will to be carried out. First, the power was not, under the will of the donor, exercisable before twenty-six, when the donee should become entitled to an interest in the fund. Next, if it was, the effect of s. 11 of the Wills Act on the exercise of a power of appointment has to be considered. This property was in no sense the property of the infant. This is the first time the question at issue seems to have arisen for decision, though it is a very old one, going back to a rescript of the Roman Emperor Trajan. If the view taken by the other side is right, it imputes to Sir J. Wernher a very comprehensive meaning in his use of the word "will," and not only that, but that he meant something which is not in accordance with what the law allows. The common law allowed a boy of fourteen and a girl of twelve to dispose of personalty by will, and whether by word of mouth or by writing unsigned. Personalty was of very small moment in early times. On that state of the law was engrafted the Statute of Frauds (29 Car. 2, c. 3). Sect. 5 of that Act required devises of land to be attested by three or four witnesses, thus carrying on the warning of Trajan against nuncupative or unattested wills, which easily led to fraud and perjury (judicia vera subvertantur [*sic*]): Inst. II., 11, De militari testamento. The Court is now being asked to open the door again to fraud. Sects. 19, 20, 21, and 22 imposed very large restraints on the making and proving of nuncupative wills and on the altering of written wills. Sect. 23 provided that, notwithstanding the Act, any soldier in actual military service, or any mariner or seaman at sea, might dispose of his movables, wages, and personal estate, as he might have done before the Act. That section was the successor of Trajan's rescript privileging soldiers, and is said to be the predecessor of s. 11 of the Wills Act. It was an exception, in favour of soldiers and sailors, to the general rule. It applies only to personal estate, following the old law: Swinburne on Testaments and Last Wills, 7th ed. pp. 92 et seq. Property over which a person has only a power of appointment is not his personal estate: *Commissioner of Stamp Duties* v. *Stephen* (1); *Fleming* v. *Buchanan*. (2) It is

(1) [1904] A. C. 137, 140. (2) (1853) 3 D. M. & G. 976, 979.

admitted that the infant was in expeditione, "in actual military service": see cases collected in Theobald's Law of Wills, 7th ed. p. 56. Sect. 11 of the Wills Act "is in fact carrying on a similar exemption or privilege to that contained in s. 23 of the Statute of Frauds": *In re Limond.* (1) The only question is what is the extent of the exemption or privilege. Sect. 1 of the Wills Act defines personal estate as property which by law devolves upon the executor. Personal property appointed by will in exercise of a general power of appointment does not pass to the executor "as such" within the Finance Act, 1894, s. 9, sub-s. 1: *O'Grady* v. *Wilmot.* (2) It cannot be suggested that this 1,000,000*l.* was property which passed to the executor as such. Sect. 7 of the Wills Act is a general prohibition against the making of wills, and applies to all infants. Sect. 8 deals with the incapacity of married women. Then ss. 9 and 10 lay down generally the formalities required in the making of wills and appointments by will. Sect. 11 goes back to the general prohibition of s. 7, and must be read, on the question of infancy, in connection with, and as an effective qualification of, ss. 9 and 10 only. Sect. 7 deals with capacity, ss. 9 and 10 with formalities. When the question is whether there is a valid will, those three sections have to be looked at. But they do not touch the question of capacity to exercise a power of appointment. Though there is authority that an infant can be empowered by a testator to exercise inter vivos a power in his lifetime, there is none that he can do so by will: Sugden on Powers, 8th ed. pp. 177, 178; *In re D'Angibau.* (3) Lord St. Leonards' statement that an infant might exercise a power over personalty "is of little practical importance" since the Wills Act: Farwell on Powers, 3rd ed. p. 143. The matter depends on statute. The general rule laid down by statute is that an infant cannot make a will. That applies whether the property is his own or another person's. An exception is made in the case of a soldier on service dealing with his own property, but does not extend it to his dealing with another person's. On the true construction of the clause in Sir Julius Wernher's will conferring the power, what was meant was a will made in the ordinary way by a person of full age and executed in the usual form. There

(1) [1915] 2 Ch. 240, 248. (2) [1916] 2 A. C. 231, 248, 272.
(3) 15 Ch. D. 228, 232, 236, 241, 244, 245.

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is no analogy between the case of this infant's will and that of the will of a foreigner: Dicey's Conflict of Laws, 2nd ed. p. 826; *Barretto* v. *Young*. (1) The question is only one of the infant's capacity. There is the absolute prohibition of s. 7 against the making of wills by persons under twenty-one. It is playing with words to say that the infant had power to make something which for some purposes the law recognizes as a will.

Howard Wright, for a charity interested in default of appointment, but wishing to be neutral, took no part in the argument.

P. O. Lawrence, K.C., in reply. The appointed fund is personal estate within s. 11 as something which passes to the executor. On the authorities there is no objection to an infant exercising a power of appointment. The argument on the other side involves the proposition that even an adult soldier in the trenches cannot exercise a testamentary power of appointment to provide for his wife and children except by a formal will. Anomaly as it may be that there is by the law of England an inherent incapacity in an infant to dispose either of his own or of another person's realty, as to personalty s. 11 of the Wills Act is a saving clause in favour of infant soldiers and sailors. Once there is a valid will purporting to exercise a general testamentary power over personalty, all that has to be done is to look to see what are the terms of the gift of the donor of the power and ascertain whether those terms are satisfied by the instrument purporting to exercise the power; if they are, the appointment is good. Here the infant's will satisfies the terms of the creation of the power and the appointment is valid. The question is wholly outside the Wills Act; it is one of common law.

Cur. adv. vult.

1918. Jan. 15. YOUNGER J. This originating summons taken out by the plaintiffs as executors of the will, dated July 14, 1916, of Lieutenant Alexander Piggott Wernher, deceased, seeks the determination by the Court of the question whether that will operated to exercise a general testamentary power of appointment over a legacy of 1,000,000*l.* conferred upon the testator by the will of his father, Sir Julius Charles Wernher. The legacy is referred to in Sir Julius's will

(1) [1900] 2 Ch. 339, 342.

and in this judgment as "the third settled legacy." The first two defendants to the summons, Mr. Beit and Mr. Pollen, are, with two of the plaintiffs, trustees of Sir Julius Wernher's will. The defendant Ernest Trevor McDougal, added by amendment, is one of the legatees under Lieutenant Wernher's will and interested in that character in supporting it; while the last defendant, King Edward's Hospital Fund for London, also added by amendment, as having a substantial interest in the ultimate residue of Sir Julius Wernher's estate, would be pecuniarily benefited by a decision that the general testamentary power above referred to was not well exercised by Lieutenant Wernher's will. That instrument, although signed by the testator in London, was made by him when "in actual military service" within the meaning of these words in s. 11 of the Wills Act, 1837. It was in fact prepared, as I was told, by an eminent solicitor well known to us all. The will itself purports in express terms to exercise the power referred to. It is most carefully drafted and regularly attested. It is unnecessary, therefore, for its validity to rely upon any privileges in respect of relief from form to which a soldier's will of personal estate is entitled. The objection to Lieutenant Wernher's will as an exercise of the power is of a different kind. It is that on July 14, 1916, when he signed it, and in the month of September following, when he died—he was killed in action on September 10, 1916—the testator was an infant of between nineteen and twenty years of age.

In these circumstances it is said that it is essential to the valid exercise of this testamentary power of his, first, that it should appear by the terms of his father's will creating it that he was thereby authorized to exercise the power while still in minority, and, next, that, although it is true he was a soldier in actual military service, still it must be established that he was by law clothed as such with the capacity to exercise the power by means of a will made by him while still under the age of twenty-one years. And these are the two questions which immediately and directly arise upon the summons.

It is plain, having regard to the large sums involved in their proper solution, that they are of great importance to the parties, or at least to the legatees immediately interested in the result. But they are, or at least one of them is, of little less importance to very

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many of the British soldiers and sailors and the dependants of these men who are now, or who at any time since the commencement of the present war have been, entitled to the testamentary privileges reserved for soldiers and sailors on service and at sea. And, further, it will be found that the decision of at least the second of these questions may affect the informal wills even of adult soldiers and sailors; and it will be found also that in the background there remains for authoritative solution a question ultimately decisive of the validity, not only of this will, but of all wills of all infant soldiers and sailors. It will be agreed that upon such grave questions there should at such a time as the present be no room for doubt or mistake, and that, if there be any mistake current with regard to any of them, no time should be lost in remedying it. That such doubt and mistake prevail I greatly fear. The arguments which I have had the advantage of hearing, as well as such investigations as I have since their conclusion been able to make into the whole subject for myself, have satisfied me that upon sundry most important points there is room for serious difference of opinion; and on one there is at least reason to apprehend that a general misapprehension as to the true existing position has hitherto prevailed. I make no apology, therefore, for dealing with the subject in some detail. It is necessary to do so in order that, as a result, the trustees of Sir Julius Wernher's will may seriously consider whether, in the interests of those whom they are here to protect, they ought not to take steps to have it authoritatively decided whether probate of Lieutenant Wernher's will ought ever to have been granted. The investigation is also opportune in order that, should any doubt on that question be really well founded, those whose duty it is to watch such matters may have their attention directed to the existence of the doubt, and may decide whether legislation, declaratory or amending, should not be initiated so as to secure to our soldiers and sailors without delay the undoubted enjoyment of all the testamentary privileges worth having, which at least in recent years it has been assumed they possess. (1)

(1) After judgment was given, and as a result of it, Lord Finlay L.C. introduced a declaratory clause into a Bill then passing through the House of Lords, declaring the wills of infant soldiers to be valid. The Bill passed, and received the Royal Assent on February 6, 1918, as the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58).

The facts of the present case may be shortly stated. [His Lordship stated them as set forth above, and continued:] It will be seen, from the above statement, that the persons really concerned to contest the validity as an appointment of that settled legacy by Lieutenant Wernher's will are Lady Wernher and King Edward's Hospital Fund for London. From motives which are altogether creditable to her, and which will doubtless prompt her to see that so far as his legatees are concerned her son's wishes are not in any event disappointed, Lady Wernher has throughout been unwilling to contest that will, and in fact she has joined in proving it. For similar reasons King Edward's Hospital Fund have been unwilling to assume a rôle which seemed to them ungracious, and on their express instructions Mr. Howard Wright, their counsel, took in the end no part in the argument. In these circumstances, at my request, the defendant trustees of Sir Julius Wernher's will, in protection of these possible interests of Major Wernher's unborn issue which I have above described, agreed to instruct their counsel, Mr. Upjohn and Mr. Galbraith, to place before the Court such arguments against the appointment as occurred to them. I am obliged to them for having done so. Mr. Upjohn, however, more than once disclaimed any intention of arguing the case, as, in his own words, a litigant; on the other hand, the case for the will was most vigorously presented by Mr. P. O. Lawrence and Mr. Harman. So assisted it remains for me, with a due sense of my responsibility and as best I can, to dispose of the summons according to law.

Dealing with the arguments on one side or the other in their logical order, I would desire first to dispose of a suggestion of Mr. Upjohn that, upon the true construction of the power contained in Sir Julius Wernher's will, Lieutenant Wernher was not entitled to exercise that power until the time came when he had himself some present personal interest in the legacy, namely, on his attaining the age of twenty-six. In my opinion the suggestion is not well founded. On the true construction of the clause in his father's will, Lieutenant Wernher's power to appoint does not in any way appear to depend upon his having at the time any present interest in the income. The fact that he was, when in life, in enjoyment of only half of the income would not, even according to Mr. Upjohn's suggestion, preclude him from appointing at his death the whole of the capital;

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and I can see no reason, on the clause as it stands, why he should be in any worse position in that respect because he was never when alive entitled to any income at all. The testator draws no distinction between the period before his son attains twenty-one and the period after twenty-one and before twenty-six. His only condition is that the appointment must be by "will or codicil." What that condition involves I will consider in another connection. For the present it suffices to say that no possible view of it would appear to lend support to this suggestion, from which I now pass away.

The next point in order is the submission which Mr. Lawrence put in the forefront of his argument, namely, that the mere production of the probate of Lieutenant Wernher's will, containing in plain and express terms as it does the exercise by him of the general power conferred upon him by Sir Julius Wernher's will, is in this Court conclusive that the power was thereby well exercised. In support of this proposition Mr. Lawrence relied upon the well-known case of *In re Price* (1), where Stirling J. explained that the word "will," in such a power as we are here dealing with, includes any instrument recognized by the law of England as a will. He placed reliance also on the judgment of Sargant J. in *In re Wilkinson's Settlement* (2), in which that learned judge, after expressing his concurrence in Stirling J.'s view, said that, "consequently, the conditions requisite to the exercise of the power had been complied with when once you found probate in this country of a will of a donee of such a power purporting to exercise the power." And again: "When once English law has recognized a document as a will by admitting it to probate, that document is a will within the meaning of such a power as this, and is therefore capable of exercising the power." Reference in support of his contention was also made by Mr. Lawrence to the decision of Sir John Romilly M.R. in *D'Huart* v. *Harkness*. (3) That was a case in which personal property was held under an English will, in trust for such person as an English lady should, by her last will in writing duly executed, appoint. She afterwards married a Frenchman, and died domiciled in France, having appointed the property by a will, unattested but valid according to the law of her domicil, and admitted to probate here.

(1) [1900] 1 Ch. 442. (2) [1917] 1 Ch. 620, 626.
(3) 34 Beav. 324, 327.

Sir John Romilly held that to be a valid execution of the power. In the course of his judgment he made the following observations which were strongly relied on by Mr. Lawrence. "I think," said the Master of the Rolls, "this is a clear case. It is true, that the effect of probate is not conclusive as to what this Court must hold to be its construction as to the rights to the property disposed of by the will, but it is conclusive to this extent, that the instrument admitted to probate is the will of the testator. But the will admitted to probate may be the last will, without being a due execution of a power of appointment. It is, therefore, necessary to refer to the original instrument creating the power to see if the formalities required have been followed in the instrument purporting to execute it. Here I find this:—A sum of money is given simply, to such person as the Baroness shall, by her last will duly executed, appoint. What does that mean? it means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive, that it is good according to the English law." I need hardly say that I accept all these observations to the full, and I would gladly, if I thought I might properly do so, dispose of this case on this short ground put forward so prominently by Mr. Lawrence. But I cannot. I was warned by Mr. Upjohn that, if the Wills Act, 1837, was looked at, it would be found that Lieutenant Wernher's will, although properly, so he said, admitted to probate so as to pass his own personal property, was altogether inoperative to exercise any testamentary power over the personal property of any one else. And in my opinion none of the cases cited justify me in refusing to embark upon the inquiry whether that warning is right.

The difference between the wills in *In re Wilkinson's Settlement* (1) and *D'Huart* v. *Harkness* (2) and that of Lieutenant Wernher is that the Wills Act had nothing to do with either of the first two, while it has or may have everything to do with Lieutenant Wernher's. The testatrix concerned in each of the first two cases was domiciled abroad, and, as was said by Lord Wensleydale in *Bremer* v. *Freeman* (3), "Their Lordships do not wish to intimate any doubt that the law of the domicile at the time of the death is

(1) [1917] 1 Ch. 620. (2) 34 Beav. 324.
(3) (1857) 10 Moo. P. C. 306, 359.

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the governing law (see Story, Conflict of Laws, s. 473), nor any that the statute, 7 Will. 4 & 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law." Or, as was said by Stirling J. in *In re Price* (1), "Provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England." In my opinion, therefore, the observations of Sargant J. and Sir John Romilly have no complete application to the present case. They are, it is true, in each instance expressed in general terms, and were doubtless properly so expressed when read in connection with the particular circumstances of the case in hand. If, however, they are to be extended to a will to which the Wills Act does or may apply, then it would, I think, be more proper, in defining the word "will" in such a context as we find in Sir Julius Wernher's will, to say that it means an instrument recognized by the law of England as a will subject to this qualification, that the instrument shall, by the same law, be, as a will, a valid medium for the exercise of the power. It is not disputed that every word of this would be necessary to describe the position if the property over which Lieutenant Wernher had possessed a general power of appointment had been, even in part, real estate. It is agreed that the exercise by him of such a power over real estate by a will made during infancy would have been quite inoperative, whatever the terms of the power. It is said that this is an anomaly, and the observations of Brett L.J. in *In re D'Angibau* (2) are referred to. But this answer does not in this connection strike me as convincing, when the question is whether we are not here confronted with a further anomaly of an exactly similar kind.

I am compelled, therefore, to proceed to the inquiry whether it can be affirmed of Lieutenant Wernher's will that it is a valid medium for the exercise of the power. As I have already indicated, Mr. Upjohn's point on that was that, under the Wills Act, Lieutenant Wernher's infancy at the date of its execution makes his will inoperative as an exercise of any testamentary power over even personal estate. It was, however, part of his contention that the will was properly admitted to probate as a disposition of the testator's own

(1) [1900] 1 Ch. 442, 451. (2) 15 Ch. D. 228.

personal property, and was so far valid. Having entertained a very strong doubt whether there was any real ground for such a distinction, I proceeded, for a reason already hinted at and to which I will again return, to inquire for myself into that question, and I now propose to state the course of my inquiry and its result. The question is whether any of the testamentary privileges reserved to soldiers on active service have, since the Wills Act, belonged to one who is a minor—whether in truth such an one has not, like and along with all other infants domiciled in England, who are not soldiers or sailors, been deprived since the passing of that Act, and by virtue of it, of all testamentary capacity whatever.

Primarily the question is one of construction. The answer to it in the last analysis depends upon the true meaning of s. 11 of the statute. That section is as follows: "Provided always that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Although, as will appear later, the fact has been strangely overlooked at a critical moment in the judicial history of the clause, it is vital to note that this section is in form a proviso, so that the question at once arises, a proviso upon what? Is it a proviso upon the whole Act—including specially in the present connection s. 7—or is it a proviso upon the two immediately preceding sections only? Putting the distinction into words, Does s. 11, properly expanded, mean "Provided always that, notwithstanding anything in this Act contained, any soldier being in actual military service, or any mariner or seaman being at sea, being, if male, fourteen years of age or upwards, may dispose," &c.? or does it mean only, "Provided always that, notwithstanding anything in the last two preceding sections contained, any soldier being in actual military service, or any mariner or seaman being at sea, being twenty-one years of age or upwards, may dispose," &c.? It will not fail to be noted that there is some further limitation than is contained in the section to be placed upon the term "any soldier in actual military service" and upon the term "any mariner or seaman being at sea," whichever be the true view of the section; for, on any view, he must at least be fourteen years of age.

Now, If the answer is to any extent to depend upon the general arrangement of the Act, it would seem plain that it is the latter

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of these two questions that must be answered in the affirmative. The scheme of arrangement is reasonably clear. Sect. 3 describes the property which may be disposed of by will. Sect. 4 is a proviso upon the generality of s. 3. Sect. 5 saves the interests of lords affected by the increased testamentary powers of their tenants over copyhold lands. Sect. 6, in effect, brings within the scope of a will which does not dispose of it an estate pour autre vie belonging to a testator. So far the statute has been dealing with the contents of a will. It next proceeds to define the capacity of a testator, and s. 7 in unqualified terms imposes an absolute testamentary incapacity upon all minors. Sect. 8 is obviously next inserted to impose, or, rather, to perpetuate, a further incapacity upon a married woman as testatrix. Her capacity to execute a testamentary instrument is to depend not only upon her being adult; the validity of her will is also to depend upon the observance of those further rules regarding wills of married women which obtained before the passing of the Act. Then the topic of capacity is left, and the statute in ss. 9 and 10 proceeds to prescribe the formalities of a valid will, after which we have the section in question, s. 11, again, exactly like s. 4, in the form of a proviso, and presumably, as a mere matter of grammar, confined like s. 4 to the special subject with which the statute has just been dealing, namely, the formalities prescribed for a regular will; or, putting it otherwise, s. 11 is a proviso upon the sections which follow the last preceding proviso, s. 8—i.e., ss. 9 and 10—and is inserted to relieve soldiers and sailors there described from the observance in their wills of the forms and solemnities by ss. 9 and 10 required from all other persons, and is inserted for that purpose and with that result only.

And that such is the meaning of the section has been the view of judges of high authority. For instance, Cotton L.J. in *In re D'Angibau* (1), speaking of the effect of the Wills Act, says: "No will can be made by an infant." More directly Madden J. in Ireland—*In the Goods of Sarah Hale* (2)—in deciding that, within the meaning of s. 11, the lady typist of the *Lusitania* when torpedoed was "a mariner or seaman at sea," said with reference to the section: "All that the 11th section does is to release persons so situated from certain obligations as to execu-

(1) 15 Ch. D. 228, 241. (2) [1915] 2 I. R. 362, 369.

tion and verification which were imposed for the first time, for the protection of the public generally, by the Wills Act; and the difficulties that have arisen, and the cases that have been decided, on this branch of the law show how unreasonable it would have been to exact obedience to these obligations from persons in the position of soldiers and seamen when in service." The latest judicial view I have been able to find of the section is that of Sargant J. in *In re Limond.* (1) It is to the same effect as the others. Speaking of soldiers' and sailors' wills, he says that, in his opinion, they "are left entirely unaffected in respect of execution and attestation by the provisions of the Act." I am unwilling, however, to place undue reliance upon these judicial views, considerable as they are, for it may be said of all of them that this particular question of the age at which a soldier or sailor might make his will was not directly under the notice of the Court in any of the cases in which they were expressed. The typist of the *Lusitania* was not an infant. In *In re D'Angibau* (2) the position of a soldier or sailor was not even remotely under the consideration of the Court of Appeal.

I proceed, therefore, now to consider how far what would appear to be the grammatical effect of s. 11 is or is not supported by such general considerations as may properly be imported into the determination of this question. All of these considerations which have occurred to me point strongly in the same direction. Sect. 11 itself, as Sargant J. observed in *In re Limond* (3), "is in fact carrying on a similar exemption or privilege to that contained in s. 23 of the Statute of Frauds." (4) And a comparison between the two sections, whether for their similarity or for their difference, is for the present purpose both interesting and significant.

The old law with reference to wills of personal estate was, as Swinburne (5) puts it, that "a boy cannot make his testament before he have accomplished the age of fourteen years, nor a wench before she have accomplished the age of twelve years." This was left entirely untouched by the Statute of Frauds. Before that statute, however, nuncupative wills of personal estate were the rule—that is to say, no ceremony or form was requisite; no writing was necessary. The

(1) [1915] 2 Ch. 240, 251.
(2) 15 Ch. D. 228.
(3) [1915] 2 Ch. 240, 248.
(4) 29 Car. 2, c. 3.
(5) Swinburne on Testaments, and Last Wills, 7th ed. p. 114.

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facilities for all in this matter were so great that no special privileges for soldiers or any other class were either necessary or possible. What the Statute of Frauds did was to introduce for the first time certain forms and solemnities into the making of wills of personal estate. Then, for the first time, it was deemed expedient to reserve their former privileges to soldiers and sailors. This was done by s. 23. That section is as follows: "Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this Act." The origin of the enactment is not doubtful. "It cannot be denied that the principle of this section was borrowed from the civil law," says Sir Herbert Jenner Fust in *Drummond* v. *Parish* (1); "indeed, that is not denied, it is admitted on all hands. It appears, from the preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army;—therefore I think it quite clear, that the principle of the exception was borrowed from the civil law; and that in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to." In what, then, did these privileges consist? They will be found summarized in book II., title 11, of the Institutes of Justinian, and the privileges were elsewhere extended to seamen in the fleet and firemen. They consisted, as explained by Sir Herbert Jenner Fust in the judgment from which I have already cited, in soldiers being allowed while "on an expedition" to make their wills without having a certain number of witnesses to attest them and without the observance of other solemnities. The reason for them is thus described by Sir Francis Jeune in *In the Goods of Hiscock* (2) when discussing s. 11 itself: "I am inclined to the view that the reason and principle underlying those words are the same as prevailed under the Roman law, namely, that a soldier in the circumstances mentioned, or a sailor who is actually at sea, is, possibly, not altogether, but certainly to a great extent, inops consilii, and therefore not in a position to make his will in the form required of persons in ordinary circumstances." And if that be, as I believe, the true

(1) (1843) 3 Curt. 522, 531. (2) [1901] P. 78, 80.

explanation of the privilege, one would expect the fact to be, as it is, that by the civil law there was no lowering of the age of testamentary capacity for the privileged soldier. "If," says Swinburne (1), speaking of the civil law, "the boy were of that strength, that he were a soldier, notwithstanding those great privileges which do belong to soldiers in making of their testaments, yet could not he make his testament before he had accomplished his age of fourteen years." As I have already said, this was also the case after the Statute of Frauds. The characteristic privilege has always been a release from the observance of forms and solemnities. As it is put in Powell's note to Swinburne (2) in a passage based upon 1 Bl. Com. p. 417, "By the 23rd section of the above Act of 29 Car. 2, soldiers in actual military service, and mariners or seamen at sea, are exempted from the provisions of that Act: and they may at this day make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases."

It is noticeable that the privilege only existed in the civil law while on an expedition—here when on active service. There is good reason for withdrawing the privilege when on return to civil life no reason for its continuance exists. But how extraordinary to withdraw, when the soldier is older, a capacity to dispose conferred in earlier youth—an in and out provision surely inappropriate in such a connection! And how extraordinary also not even to reserve to the soldier on his return to civil life power to alter or revoke his military will made in active service! If the disability of infancy revived so as to prevent him then from making a new will while still an infant, it revived also, I suppose, to prevent him from altering or revoking a former one. The power of revocation is merely another aspect of the power of disposition. His trench-made will, on this view, would remain binding on him during minority, or until marriage, however hastily conceived it may have been, however distasteful in its terms it might have become. It was, of course, unnecessary that any of these matters should have been provided for by s. 11 of the Wills Act if the universal testamentary age under that Act was twenty-one; it was unnecessary

(1) Swinburne on Testaments and Last Wills, 7th ed. p. 114.

(2) Swinburne on Testaments and Last Wills, 7th ed. p. 89.

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that they should ever have been so provided for in any system where there is no difference between the testamentary age for military and civilian testators—if a compendious expression may be allowed. And they are not so provided for by the Wills Act any more than they are in the Roman law. The thing may be put in another way: if, for the first time, the Wills Act of 1837, while still using the ancient form of words, had intended to innovate to such an extent upon the old principle, one would have expected some clear indication to that effect, and some proper and equitable provisions for the first time rendered appropriate or necessary by the innovation. There is no such indication, and there are no such provisions. On the contrary, as I have already shown, upon the plain construction of the Act, apart from all extraneous considerations whatever, there would appear to have been on this old principle no innovation at all.

But this survey of the earlier law, with special reference to the precise terms and effect of s. 23 of the Statute of Frauds, does greatly emphasize the force of the inference to be drawn merely from the terms and position of s. 11 in the Act of 1837. One can now appreciate fully the appropriateness, even the emphasis, of the place in the statute held by that section, and the significance already indicated of the variation in form between it and s. 23 of the Statute of Frauds. It now becomes quite clear that the two sections are really the same, and that the variations in form between them are no more than is necessary to preserve that same meaning and operation for s. 11 in its new context and environment which s. 23 had in the Statute of Frauds. "Personal estate" being comprehensively defined in the new Act as hereafter appears takes the place of "moveables, wages and personal estate" of the Statute of Frauds, which contains no definition clause. But—what is much more important—the introductory words of s. 23, "Provided always, that notwithstanding this Act," perfectly correct in the Statute of Frauds, which imposes forms only and does not deal with capacity, are in s. 11 of the Wills Act cut down to the words "Provided always that," so as, apparently consistently with the true principle of this exemption from its beginning until then, to prevent the possibility of its being said that it had any reference to anything but the forms and solemnities prescribed by the sections to which the proviso is

immediately attached, or that it, temporarily or otherwise, lowered the age of capacity prescribed for all testators by s. 7.

On all these grounds, had the matter been res integra, I should have arrived very clearly at the conclusion that, upon the true construction of the Wills Act, 1837, s. 11 in no way limits the unqualified terms in which s. 7 is couched, and that, accordingly, no soldier or sailor or seaman is, any more than any other male or female domiciled here, entitled to dispose by will of any personal estate until he or she has attained the age of twenty-one. And I should have reached this conclusion for the reasons above given and without reference to any documents or considerations not strictly admissible for the purpose.

One further matter, however, I now mention merely as one of interest, although, following Lord Halsbury in the Solio case,—*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (1)—I might have been entitled to refer to it for a more effective purpose. The Wills Act of 1837 has a well-known history. It is based upon the Fourth Report of the Real Property Commissioners and was prepared by Mr. John Tyrrell, himself a member of the Commission, with the assistance of Lord Langdale. So intimately connected with the statute is that Report that in Mr. Henry Sugden's essay on the Law of Wills, written and published in 1837 with immediate reference to the Act, he prints the relevant parts of the Report, saying at p. 2 that "the Report frequently throws a light upon provisions in the Act which without it might appear obscure." I have read that Report. I would refer, without setting them forth, to the Commissioners' observations and recommendations at pp. 22 and 23 and to No. 4 and No. 7 of their propositions. These will show how accurately the intentions of the Commissioners have been given effect to, if the construction of the Act be that which I have on this point, and, for the reasons I have given, ventured to suggest is the true one.

But notwithstanding all these considerations tending to establish the testamentary incapacity, as the law stands, of every infant, soldier or otherwise, one is confronted with the fact that Lieutenant Wernher's will has been admitted to probate, and that it is

(1) [1898] A. C. 571.

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apparently now the practice of the Probate Division to admit infant soldiers' wills to probate, and that the practice is recognized and not disapproved by the text-writers. And, being tempted to inquire how such a practice could have sprung up, one finds that the origin of the practice is as surprising as its existence. This practice, which, if I be right in what I have suggested, would not only be contrary to the terms and intention of the Act, but does in fact revolutionize the principles that had governed the soldiers' privilege from the earliest times, is based entirely upon a decision of Sir H. Jenner Fust of *In the Goods of Farquhar* (1) given in the year 1846, upon an ex parte motion by Dr. Phillimore, without argument and reported only in 4 Notes of Cases. In that case the facts were that the deceased, a cornet in the 11th Regiment of Bengal Light Cavalry, died, a bachelor and a minor, in 1846. He wrote a will in pencil, (which the surgeon alone attested) on the field of battle. On an application for a grant of administration with will annexed Sir H. Jenner Fust is reported to have said: "This is the first case of the will of a minor dying on the field of battle. The question is, whether it is a good and valid will. Under the general provisions of the Act, it is not; but under the 11th clause, it would be valid whether the deceased were major or not: 'any soldier, being in actual military service, may dispose of his personal estate as he might have done before the making of this Act.' Then, as he might make such a will according to the Statute of Frauds, and even a nuncupative will, and whether major or minor, according to this clause, this is a good and valid will." It would appear from this judgment that none of the considerations or matters to which I have here drawn attention were present to the learned judge's mind. Sect. 11 is treated as a substantive section, not as a mere proviso. It seems for the moment to have been supposed that soldiers' privileges were in some way conferred by the Statute of Frauds—possibly even that the bar of infancy, in the case of soldiers, was removed by that statute, although the fact was that that statute did not touch the question of infancy at all, and that all infants over twelve and fourteen, after it as before it, remained clothed with testamentary capacity so far as personal estate was concerned, and none the less so, as Knight Bruce L.J. might have said, if one may paraphrase a

(1) 4 Notes of Cases, 651.

famous judgment of his, because they were soldiers. Speaking with all respect, the judgment cannot, I think, be regarded as an adequate treatment of what has now become a most important subject, or a sufficient justification for the order which followed upon it, or the practice which has succeeded it. In his most elaborate judgment on another aspect of the same s. 11—*Drummond* v. *Parish* (1), already cited—Sir H. Jenner Fust himself indicates the advantages of dealing with such matters after full consideration and not on motion. Yet it is on his observations in *In the Goods of Farquhar* (2), merely noted, and given on motion, and on these observations alone, that the present practice stands. That result has doubtless been assisted by the fact that the cases have in the interval been most infrequent, and that the law of wills before the Statute of Frauds, and even before the Wills Act, has gradually become unfamiliar. I can find only one reported case since *In the Goods of Farquhar* (2) in which the point could have been raised, *In the Goods of M'Murdo* (3), and it was not there mentioned. The text-books simply state the proposition, and cite *In the Goods of Farquhar* (2) in support of it without comment. In Williams' Law of Executors and Administrators there does appear to be some reserve on the part of the learned author. The case, it is there said, was "on motion," and the effect of the judgment is given, s. 11 being stated as a substantive section: see 9th ed. vol. i. p. 106. In Theobald's Law of Wills too, curiously enough in the successive editions (see e.g. 6th ed. p. 54), s. 11 is stated also as if it were a substantive section. In these circumstances I cannot but fear that, if this question be now brought to the notice of the Court of Appeal, perhaps even if it be fully argued before the Probate Division itself, it will be found that there is no statutory warrant for the present practice, and no such authority for it, or such extensive application of it, as to justify its continuance in the absence of such warrant, and, further, that, as the statute law now stands, an infant soldier cannot make a valid will of personal estate, whether formal or informal. It is for others to consider whether, at such a time as the present, with our manhood in arms, this uncertainty as to a young soldier's testamentary powers should be allowed to continue. It may be

(1) 3 Curt. 522. (2) 4 Notes of Cases, 651.
(3) (1867) L. R. 1 P. & M. 540.

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that the age of fourteen for any boy to make a will is too young. But, if a soldier lad can be called upon to fight at eighteen and be allowed to vote at nineteen, it will now seem to many to be irrational, whatever may have been thought by the legislators of 1837, that he should not be able, until he is twenty-one, to bequeath his property to whom he pleases. But, as matters stand, I feel that, if the Legislature do not move in the matter—if they do, the action of the trustees would of course depend upon that of Parliament—the trustees of Sir Julius Wernher's will—who alone in these proceedings represent the unborn issue of Major Wernher—ought carefully to consider whether it is not their duty to apply to the Probate Division to revoke the probate of Lieutenant Wernher's will, and to carry the case, if necessary, to the Court of Appeal, so that an authoritative decision one way or the other may be obtained.

At the present stage, however, and in these proceedings, while the probate remains unrevoked, it is conclusive in this and in all Courts that there was testamentary capacity possessed by Lieutenant Wernher at the date of his death presumably to dispose of his own personal property. In other words, I am bound to accept the view that s. 11 of the statute qualifies s. 7. But it is said by Mr. Upjohn, as I have already mentioned, that that capacity did not so far extend as to enable him to exercise, while still minor, a testamentary power of appointment over the property of another. This raises a most important question, with reference to which it will be convenient at the outset to deal with a point that was the subject of considerable argument—namely, Could an infant soldier, by an informal will executed prior to the Act of 1837, and, if you please, prior to the Statute of Frauds, exercise a general testamentary power of appointment over personal estate? It is agreed that there is no precedent for such an exercise to be found in the books. I have, however, arrived on principle at the conclusion that he could. As Sir George Jessel remarked in *In re D'Angibau* (1), there are cases in which an infant may exercise a power collateral over personal property, when he could not have disposed of the property had it been his own, and he suggested that the only reason for that must be that, in the view of the law, "it requires more discretion to dispose of your own property than to dispose of other people's." And so Lord St. Leonards in his

(1) 15 Ch. D. 228, 233.

book on Powers (1) says: "An infant might exercise a power over personalty at the age at which, by law, he might dispose of personalty to which he was absolutely entitled." Much was made of the fact that *Hearle* v. *Greenbank* (2) is cited by Lord St. Leonards in support of that statement, and, it was said, a reference to *Hearle* v. *Greenbank* (2) does not bear it out. I speak with diffidence on such a point, but I do not quite agree. It is true that in *Hearle* v. *Greenbank* (2) the personal property in question was the separate estate of the infant testatrix, and was not property over which she had a mere power. But a perusal of Lord Hardwicke's judgment seems to me to show that one of the main grounds on which he based his decision, that the lady could not by her will exercise during infancy any power over the real estate, was that during infancy she could not have disposed of it had it been her own. It appears to me, therefore, that the statement in Sugden on Powers (1) is at least implicit in *Hearle* v. *Greenbank* (2), and so Cotton L.J. seems to think when in *In re D'Angibau* (3) he says: "*Hearle* v. *Greenbank* (2) is, as regard powers over personal estate, only an authority that a power to appoint by will can be exercised during infancy after the infant has attained the age when, independently of any power, he could make a will of personal estate; and the passage of Lord St. Leonards (4) referred to by the Master of the Rolls and in argument before us does not carry the case any further. That passage is as follows: 'An infant cannot exercise a power over real estate unless it be a power simply collateral, but as to personalty, clearly he may exercise a power over that at the age at which by law he may dispose of personalty to which he is absolutely entitled.' There is no authority that a power the exercise of which can affect the interest of the infant, or one in gross, can be exercised by an infant, except where infancy would not, if there were no power, prevent him from disposing of the property." Moreover, it is to be noted that Lord Hardwicke himself took much the same view of *Hearle* v. *Greenbank* (2) in *Boughton* v. *Boughton* (5). "There," he says—that is, in *Hearle* v. *Greenbank* (2)—"Mrs. Winsmore was a

(1) Sugden on Powers, 8th ed. p. 178.
(2) (1749) 3 Atk. 695.
(3) 15 Ch. D. 240.
(4) Sugden on Powers, 8th ed. p. 177.
(5) (1750) 2 Ves. Sen. 12, 14.

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feme covert and an infant, and had by her father's will a power to dispose of real and personal estate; and being about seventeen, disposed of the personal estate of her father for her daughter, and her real estate to two collateral relations; and died under age. I was of opinion, that as to the personal it was a good will, because of her power, which took off the disability from being married, leaving her in the same condition as a feme sole; in which case, being about seventeen, she might make a will of personal; but that as to the real, her will was void because of her infancy, as it would if she had been a feme sole." Lord Hardwicke thus seems to treat Mrs. Winsmore's disposition of her separate personal estate as if it depended upon the same principles as those which would have obtained if that disposition had been the exercise by her of a power over the property. But, apart from all that, it appears to me that such a statement as that of Lord St. Leonards, repeated in every edition of his work, frequently quoted, and never, so far as I can find, questioned, is now a statement of authority to be followed.

In my opinion, therefore, an infant soldier, having before the Wills Act capacity to dispose by a will, however informal, of his own personal property, had on the principle of *In re Price* (1) and that enunciated by Lord St. Leonards as above, power to exercise by that will a power over personalty exercisable by will.

Has, then, this power been taken away by the Act of 1837, assuming, as for this purpose I now do, that, notwithstanding that Act, an infant soldier may still dispose by informal will of his own personal estate? The grounds upon which, as I understand them, it is suggested that the power has been taken away, or, rather, I should say, is not reserved, flow from a critical examination of the definition section of the statute and ss. 7 and 11. The definition section, s. 1, of the Wills Act, 1837, is so far as material as follows: "The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word 'will' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and . . . . to any

(1) [1900] 1 Ch. 442.

other testamentary disposition; . . . . and the words 'personal estate' shall extend to leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein." The argument is that you must read these definitions into ss. 7 and 11 and, when you have done so, you have this result: s. 7 reads "No will or appointment by will made by any person under the age of twenty-one years shall be valid"; s. 11, "but this is not to prevent any soldier, &c., being in actual military service, from disposing of his own personal estate" (that is said to be the effect of the definition of personal estate having regard to *O'Grady* v. *Wilmot* (1)), "as he might have done before the passing of the Act." And the effect, so it is said, is to prevent any infant soldier by any kind of will, and any adult soldier by any other than a formal will, from exercising a general testamentary power; the liberty reserved by s. 11 being only to dispose of the testator's own property.

Now, in an Act, in which, as appears from s. 27, the distinction between property of the testator and property subject to a general testamentary power of appointment by him is so fine that a general gift by will of his own property is to include a gift of that over which he has merely a general power of appointment, the result of this construction is startling, and not lightly to be accepted. And, in my opinion, the view contended for is erroneous on more grounds than one. First, I think the contention that "personal estate" in s. 11 excludes all personal estate over which the testator had merely a general power of appointment, on the ground that the latter does not pass to the executors as such (see *O'Grady* v. *Wilmot* (1)), is answered by the fact that the definition in the Wills Act says nothing about the executors "as such." The actual definition is satisfied if the words which are there to be found, namely, "devolves upon the executor," are made to mean what Lord Sumner in *O'Grady* v. *Wilmot* (1) would have wished to make the words "executor as such" mean in that case had he thought it possible; that is to say, "pass to the person who happens to be executor, and not in any capacity known

(1) [1916] 2 A. C. 231.

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to the law distinct from executorship, such as that of heir at law, reversioner, legatee, or trustee." (1) As the rule now is that the trustees of a fund subject to a general power of appointment are bound to pay it over to the executors of the appointor whether his estate is indebted or not, and by doing so they discharge themselves (2), it involves no great straining of language to say that, in a perfectly rational sense, appointed personal property does devolve on the appointor's executors. But, apart from that, the words " personal estate " are more than once used in the Wills Act in the sense of property over which there is exercisable a power of appointment. That sense is included in the words as used in s. 15, in s. 18, in s. 23, and particularly in s. 27. And if it be suggested that in these sections, within the meaning of the definition clause, " the nature of the provision or the context of the Act " excludes the defined meaning, the answer is, Not more so than in s. 11. For not only is a form of words used in that section which, if used by the soldier in his will to dispose of his property, would under s. 27 comprise property subject to a power of appointment, but s. 11, whatever else it may be a proviso to, is certainly a proviso to s. 10, which prescribes the formalities for the exercise of testamentary powers, and one need hardly look for a more appropriate form of words to preserve, as it would appear s. 11 is intended to preserve, the informal exercise of a testamentary power which, as I have already shown, was the privilege of a soldier's will before the passing of the Act.

Further, I think, this argument of Mr. Upjohn fails also when it deals with s. 7. It is true that by the definition clause " will " means both a will and an appointment by will. But that does not show that, if you find a section of the Act which requires you to recognize a will of A. B. although he is a minor, you must insist upon his being twenty-one before you can recognize an appointment made by his will. And when, by placing that construction on the Act, you find that you are going contrary to established principle, and are requiring for the disposition of another man's property a higher and not a lower standard than you require for the disposal of his own, such a construction is not, I think, admissible unless the language of the statute clearly requires it. The alternatives, therefore, on this point appear to be these: by an unduly strict and at least

(1) [1916] 2 A. C. 269. (2) [1916] 2 A. C. 270, 271.

possibly inadmissible construction of the definition clause, and by a forced application of that construction to s. 11, you succeed in depriving the soldier of a privilege he enjoyed before the Act, and insist upon a stricter rule for the disposal by him of other people's property than for the disposal by him of his own; by adopting a less strict but quite permissible construction of the definition clause you preserve for the soldier all his former privileges, you make, as s. 27 makes, no distinction between his own property and that over which he has a power of appointment, and you give full effect to the fact that s. 11 is a proviso on s. 10 which the other alternative ignores.

If these alternatives have been, as I think, fairly stated, I can have no doubt as to which of them I must accept. On the hypothesis on which this judgment exclusively proceeds I am of opinion that the will of Lieutenant Wernher operated to exercise his general power of appointment over the third settled legacy.

Solicitors: *Charles Russell & Co.; Robert Harradine; Holmes, Son & Pott; Freshfields.*

A. L.

SARGANT J.
1917
Dec. 6.

In re WARNER.
WATTS *v.* SILVEY.

[1917 W. 995.]

Will—Construction—Gift to Woman during Widowhood—Gift over to Children at her Death—Vesting on Remarriage.

Testator gave property to trustees in trust to pay the income to his wife during her widowhood, and, after her "death or remarriage," to hold the property in trust "for all or any my children or child living at the decease of the survivor of myself and my said wife and the children then living of any deceased child of mine," who were to take the parent's share. At the date of the widow's remarriage all the testator's children were living, but in her lifetime one child died leaving children, and there were children of one of the surviving children of the testator:—

Held, following *Bainbridge* v. *Cream* (1852) 16 Beav. 25, *Stanford* v. *Stanford* (1886) 34 Ch. D. 362, and *In re Tucker* (1887) 56 L. J. (Ch.) 449, that the children living at the date of the remarriage then took immediate vested interests to the exclusion of all grandchildren.

R. E. WARNER, by his will, dated August 31, 1904, gave his realty and personalty to his wife, Julia Decima Warner, and his sons, John Robert Warner and James William Warner, upon trust to convert the same, and out of the proceeds of the conversion to pay his funeral and testamentary expenses and debts, and to invest the residue of such proceeds; and upon trust that they "shall pay the income of the investments constituting my trust estate to my said wife during her widowhood, and after the death or remarriage of my said wife shall stand possessed of my said estate and the investments and income thereof in trust for all or any my children or child living at the decease of the survivor of myself and my said wife and the child or children then living of any deceased child of mine who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry, if more than one in equal shares, but so that the children of any deceased child of mine shall take equally between them, as tenants in common, only the share which their parent would have taken had he or she survived me and attained a vested interest."

The testator died on December 29, 1904, and his will was proved by his widow and J. R. Warner.

The testator left eleven children, all of whom survived him and were living when his widow on December 12, 1906, intermarried with one Watts.

After her second marriage one of the sons of the testator died leaving an infant child, and by his will he gave all his property to his widow.

Another son of the testator had been serving with His Majesty's Forces in the war, and had been reported missing in July, 1916, and had not since been heard of.

Two of the still living children of the testator had infant children.

An originating summons was taken out by Mrs. Watts and J. R. Warner against the surviving children of the testator (except J. R. Warner) and his grandchildren for the determination of the question whether deceased children of the testator who were living at the date of his widow's remarriage acquired or would acquire vested interests in the residuary estate upon attaining the age of twenty-one years, or, being daughters, marrying, or whether the residue ought to be accumulated until the death of Mrs. Watts and divided among the testator's children then living and the children or child then living of any deceased child of the testator who being sons or a son attained twenty-one or being daughters or a daughter attained that age or married.

E. A. Jennings, for the plaintiffs, stated the facts and the question involved, and referred to *In re Tucker* (1), where a testator had bequeathed a fund upon trust for a woman for her life or until she should marry again, and directed his trustees, after her decease or marrying again, to divide the fund equally between all her children "living at the time of their mother's decease" and the issue of any deceased child, the issue taking the parent's share, and Stirling J. held that on the woman marrying again her children took immediate vested interests.

G. M. T. Hildyard, for the testator's surviving children and the legatee of a deceased child. The children who were living at the date of the remarriage then took vested interests. In *Bainbridge* v.

(1) 56 L. J. (Ch.) 449.

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Cream (1) the bequest was to the wife for her life, but if she married again the gift was revoked, and after her decease or second marriage, whichever should first happen, the testator gave the property equally amongst certain named nephews or nieces or such of them as should be living at the wife's death, and Romilly M.R. held that on the wife's remarriage the property became immediately distributable. That case was followed by Chitty J. in *Stanford* v. *Stanford* (2), and the rule—in the converse case of a gift to a woman so long as she remains unmarried and that on her marrying the property is to go over to another—that on her death without having married the gift over takes effect, was approved by Jessel M.R. in *Underhill* v. *Roden.* (3)

F. K. Archer, for the infant grandchildren. The gift over only takes effect on the death of the testator's widow, which has not yet happened. *Stanford* v. *Stanford* (2) is distinguishable. There is no such necessary implication that the children were to take on the remarriage as to compel the Court to decide that they did then take: *In re Tredwell.* (4) [He also referred to *In re Akeroyd's Settlement.* (5)]

SARGANT J. In this case I must do what Stirling J. did in *In re Tucker* (6), that is, follow the previous decision in *Bainbridge* v. *Cream* (1), as approved by Chitty J. in *Stanford* v. *Stanford.* (2) I feel the same difficulty as Stirling J. did as to the precise principle on which *Bainbridge* v. *Cream* (1) was decided, but it may probably have been a principle analogous to that governing the decisions in *Underhill* v. *Roden* (3) and cases of that kind. In those cases limitations to a woman until marriage or remarriage, followed by a gift in remainder on her marriage or remarriage, have been held to result in the remainder taking effect, not only in the event of marriage, but also on her death without marrying. And it would seem to be by a sort of analogy that in *Bainbridge* v. *Cream* (1) and *In re Tucker* (6) a gift to a woman during widowhood, and after death or remarriage to persons or a class of persons living at her death, has been held to enure on her remarriage for

(1) 16 Beav. 25.
(2) 34 Ch. D. 362.
(3) (1876) 2 Ch. D. 494.
(4) [1891] 2 Ch. 640, 654.
(5) [1893] 3 Ch. 363.
(6) 56 L. J. (Ch.) 449.

the immediate benefit of the persons or class of persons then living. In each class of case the Court seems to have treated the express mention of one only of the two relevant events as due to slovenliness or carelessness, and to have succeeded in spelling out of the express gift, and effectuating by way of implication, a corresponding gift in the other corresponding event.

I think that the Courts have gone to the extreme limit in so giving effect to testators' intentions, but, in accordance with the decision of Stirling J.,—one of the most careful judges who have ever sat in these Courts—I decide that the cases relied on in *In re Tucker* (1) govern the present case, and I give effect to the sufficiently indicated intention, if not the precise words of the testator, by holding that the persons to take were the children of the testator living at the time of his widow's remarriage.

Solicitors for all parties: *Rawle, Johnstone & Co., for Little & Whittingham, Stroud.*

(1) 56 L. J. (Ch.) 449.

F. E.

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[1916 A. 1215.]

Electric Lighting –Electric Supply –Differentiation in Charges Undue Preference—"Similar circumstances"—"Corresponding supply"—Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *ss.* 19, 20.

The defendants supplied electrical energy for power and light. Power was charged at a cheaper rate than light, and power consumers were allowed to use 20 per cent. of the total energy consumed for lighting their factories, provided that the whole supply was taken from the same service and meter:—

Held, that this was no contravention of the Electric Lighting Act, 1882, ss. 19, 20.

Principles stated in *Metropolitan Electric Supply Co.* v. *Ginder* [1901] 2 Ch. 799 and *Attorney-General for Victoria* v. *Melbourne Corporation* [1907] A. C. 469 followed and applied; *Attorney-General* v. *Long Eaton Urban Council* [1914] 2 Ch. 251; [1915] 1 Ch. 124, distinguished on facts but applied in principle.

Decision of Astbury J. affirmed.

WITNESS ACTION.

This was an action by the Attorney-General at the relation of the Gas Light and Coke Company, hereinafter called the Gas Company.

The Gas Company were incorporated by the Gas Light and Coke Company's Act, 1868 (31 & 32 Vict. c. cvi.), for the purpose of manufacturing and supplying gas for lighting and other purposes within their district under the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125). They had supplied gas for lighting and other purposes accordingly in their district, which had been extended by various statutes.

By the Hackney Electric Lighting Order, 1893, confirmed by the Electric Lighting Orders Confirmation (No. 3) Act, 1893 (56 Vict. c. xl.), and by the Hackney Electricity Act, 1906 (6 Edw. 7, c. cxci.), the defendants were empowered to supply electrical energy within a certain area which was within the gas company's district, and had supplied electrical energy for lighting and power purposes accordingly.

In July, 1914, the defendants issued a circular to their consumers and other persons residing or carrying on business in their district stating (inter alia) as follows:

"The following scale of charges is subject to such provision for

minimum quarterly or annual payments to the council as are provided for in the Hackney Electric Lighting Order, 1893, and the Hackney Electricity Act, 1906.

"(A) For lighting.

"Alternative No. 1—

"For any quantity of electrical energy used each quarter not exceeding the equivalent of one hour's supply per day at the maximum demand .. .. 6*d.* per unit.

"For any further quantity of electrical energy used each quarter .. .. .. 1*d.* per unit.

"Alternative No. 2—

"For any quantity of electrical energy used each quarter .. .. 3½*d.* per unit.

"(B) For power.

"Alternative No. 1—

"A fixed charge of 1*l.* per quarter per kilowatt of maximum power demanded, and a charge for electrical energy used of ½*d.* per unit.

"Consumers paying under this scale are allowed to use 20 per cent. of the energy consumed for lighting.

"Alternative No. 2—

"For any quantity of electrical energy used each quarter .. .. 1½*d.* per unit."

On October 31, 1916, the plaintiff commenced this action alleging that in supplying electricity under this circular the defendants were charging consumers who took electricity for lighting purposes only at a higher rate than they charged consumers who took electricity for power and light under (B) alternative No. 1, and that in thus differentiating the scale of charges between these two classes of consumers they were committing a breach of ss. 19 and 20 of the Electric Lighting Act, 1882. That differentiation was a hardship to the electricity consumers, and caused loss and damage to the Gas Company, who were ratepayers. The plaintiff claimed a declaration and injunction accordingly.

By their defence as amended at the hearing the defendants admitted the issue of the 1914 circular, and stated that in October, 1916, before the writ was issued they issued a new circular

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superseding the 1914 circular. The new (B) alternative No. 1 for power was as follows :—

"Alternative No. 1—

"Under this scale the minimum sum payable for electrical energy supplied in any quarter will be ten shillings and subject to this condition :—

"1*l.* per quarter will be charged per kilowatt demanded, and any quantity of electrical energy used each quarter will be supplied at .. .. $\frac{1}{2}d.$ per unit.

"Consumers paying under this scale are allowed to use not exceeding 20 % of the total quantity of energy consumed for lighting the factory or workshop premises in which the motors, &c., are installed, provided that the whole supply is taken from the same service and meter."

They alleged that this new circular was only intended to express, and did only express, the true meaning of, and the meaning put by the defendants and their customers upon, the 1914 circular, and they had only supplied energy to customers before the action in accordance with that meaning. They denied that the scale of charges in the circular constituted any breach of ss. 19 or 20 of the Electric Lighting Act, 1882. (1)

The evidence showed that in 1905 the defendants' electric lighting committee, after considering the London Electric Power Bills, recommended a special tariff for factory power supply, pointing out

(1) The Electric Lighting Act, 1882, provides as follows :—

Sect. 19 : "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

Sect. 20 : "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity."

that a large power business had a vast economic influence on electric supply, in that by the diversity of the demands it established a high load factor and promoted a more extended employment of the plant and mains during the day time when the lighting load was comparatively small. This tariff was adopted by the defendants, and in 1906, following the similar concession given in the Power Bills, they allowed power consumers to use 20 per cent. of their energy for lighting their factories, and had continued this concession to the present time. An attempt was made to show that in 1913—14 the defendants were actually supplying power at a loss, but the Court held that the allegation was neither relevant nor established.

The action came on for hearing before Astbury J. on July 17, 1917.

Hon. Frank Russell, K.C., *Colefax, K.C.*, and *Percy Wheeler*, for the plaintiff. To the extent that a power consumer uses his energy for light he becomes a light consumer and ought to be charged the same rate as any other light consumer. The mere fact that he takes 80 per cent. for power and 20 per cent. for light does not entitle the defendants to differentiate the charge for light as against non-power consumers: *Attorney-General* v. *Long Eaton Urban Council.* (1)

Walter, K.C., and *E. F. Spence*, for the defendants. In the *Long Eaton Case* (2) there were separate supplies of light and power. The power consumers prima facie took corresponding supplies of power under similar circumstances, and, in the absence of evidence that a power and light consumer was less costly and more profitable to the undertakers than a power consumer, there was no conceivable ground for differentiation.

In the present case power consumers who use energy night and day and have high load factors and favourably affect the diversity factor of the station are far more profitable than light consumers, and the concession enabling them, not to obtain a separate supply of light cheaper, but to use a portion of their energy in lighting their factories from the power system and meter, as allowed in Power Bills, is justified up to the hilt, not only by the *Long Eaton Case* (2), which is directly in point, but also by *Metropolitan*

(1) [1914] 2 Ch. 251; [1915] 1 Ch. 124.

(2) [1914] 2 Ch. 251, 262, 263; [1915] 1 Ch. 124, 128.

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Electric Supply Co. v. *Ginder* (1) and *Attorney-General for Victoria* v. *Melbourne Corporation.* (2)

Colefax, K.C., in reply. Disguise it as you will, there is really differentiation qua light. Take the case of a factory owner using electric light and gas power. He pays more for his light than an electric power consumer. The charge to the latter for light is in effect reduced because he takes power. Again, suppose a power consumer using gas for lighting gives up gas and takes 25 per cent. more power energy for lighting purposes. That is really light in the guise of power. But the power consumer who uses light also only pays power rate for his light. Or suppose a factory owner uses power and light before the concession. He uses the same amount of each after the concession. But his light bill is cheaper, whereas a factory owner using light only pays the same as before. The only way that a factory owner can obtain the cheaper rate for light is by taking power. That is a condition that the defendants have no right to impose, and it is a clear case of unjustifiable differentiation within the *Long Eaton Case* (3) and by analogy within *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4)

Cur. adv. vult.

July 25. ASTBURY J. (after stating the facts). The question of principle raised by this case is one of far-reaching importance to the owners of electric light undertakings in this country and to their customers.

One of the principal objects of an electric light undertaking is to utilize its plant to the best advantage, and one method of accomplishing this result is to obtain consumers of energy during the day as well as during the dark hours, and in each case to encourage consumers whose hours of consumption do not synchronize, so that the diversity between them enables the plant to satisfy a greater number of hours of maximum demand than would otherwise be the case. The proportion of the actual number of units sold to any customer during the year to the number of units which would have been

(1) [1901] 2 Ch. 799, 811.
(2) [1907] A. C. 469, 475.
(3) [1914] 2 Ch. 251, 262, 263; [1915] 1 Ch. 124, 128.
(4) (1885) 11 App. Cas. 97, 122.

sold to him if his maximum demand had been constant throughout the year is termed the "load factor" of the customer, and the ratio of the sum of the maximum loads at the consumers' terminals to the load actually observed at the station is termed the "diversity factor."

Broadly stated, power consumers have a better load factor and more favourably affect the diversity factor of the station than light consumers, which accounts for their being usually charged a lower rate, because, other things being equal, the higher the load factor the lower the cost per unit of production, and the better the diversity factor the further the undertaking can go in the earning of revenue. The increase of the load and diversity factors therefore is of the greatest importance, and tariffs should be framed in order to obtain consumers and classes of consumers whose consumption contributes to this result. This being so, as a general rule it is obvious that a consumer or a class of consumers with a higher load factor, due to the taking of a different supply under different circumstances, is entitled, in the interest of the undertaking, to differential treatment in the matter of charges as compared with a consumer or class of consumers whose load and diversity factors are inferior.

The sections of the Electric Lighting Act, 1882, which are in question are ss. 19 and 20. [His Lordship read the sections.] In the present case the exception in s. 19 with regard to the licence, order, or special Act does not apply, and it is the general enactment in those two sections which has to be considered. These sections say nothing about, and do not draw any distinction between, light, heat, or power consumers as such. The station turns out only one class of energy, which is measured in Board of Trade units, and the dissimilarity of circumstances and the non-correspondence of supply involved in s. 19 must be looked for, not in any difference in the energy consumed or in the manner in which it is led into and distributed by wiring and meterage in the consumer's premises, but in the circumstances of the consumer himself in so far as they react upon the supply that he takes, and in the time, diversity, and quantity of his consumption; in other words, the purpose to which the consumer puts the energy which he purchases, whether for lighting, power or heating, is per se irrelevant; it is in the quantum

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of and the circumstances under which he takes his supply of the one product that the undertaking offers for sale that the answer to the question as to undue preference must be looked for, and it is only for the purpose of classifying consumers according to this test that they are for convenience divided into light, power, and heat classes, such purposes involving, as I have already pointed out, well recognized differences from the point of view of load factor, diversity factor, and quantity of units purchased.

Consumers may therefore be, and are in practice, divided into classes in accordance with these considerations, and they are charged with varying and different rates and classes of rates with the object of encouraging advantageous purchasers and classes of purchasers as well as of attempting fairly to adjust the respective advantages obtained by the station from all. This has led to what are termed different systems of supply being adopted, as for instance for lighting, heat, power, &c., the consumers in each case taking the only thing that the undertakers have to sell, but under circumstances which affect differently the load factor of the station in both diversity and quantity. If the different systems of supply are fairly arrived at and are at the choice of the consumer, the preference prohibited by s. 20 is between consumers dealing under similar circumstances, and not between consumers dealing under different systems of supply, either of which they are free to select: see *Attorney-General for Victoria* v. *Melbourne Corporation* (1); and to the extent that the consumers under one system benefit the undertaking, in the way that I have described, to a greater degree than consumers under another, so they are given a benefit in the scale of charges. This is expressed by Sargant J. in the *Long Eaton Case* (2) in these words: "Any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply."

Nor is the right to differentiate the scale of charges confined to different classes of consumers or to different systems. "There is left a latitude to the company to make bargains with its [individual] customers where circumstances differ, or the supply does not correspond, for different terms. . . . . Then what does 'a corresponding supply' mean? Does it mean that you are necessarily to treat the

(1) [1907] A. C. 469, 475. (2) [1914] 2 Ch. 251, 263.

small consumer upon equally advantageous terms with the large consumer? The cost to the company may be very different; greater uniformity of demand, easier and less expensive collection of the amount to be paid are circumstances to which regard must be had": per Buckley J. in *Metropolitan Electric Supply Co.* v. *Ginder*. (1)

Therefore any differentiation fairly arrived at between classes of consumers or between consumers in any one class inter se may be made by the undertaking, providing differentiation is not made between consumers taking or entitled to supplies which correspond under similar circumstances, which is the only thing prohibited by s. 19.

The plaintiff relies upon the *Long Eaton Case*. (2) The undertakers in that case charged power users one rate for lighting and another rate for power, and provided that a factory owner A. who took all his power and light from the undertakers should obtain his power supply at a less charge per unit than a factory owner B. who took power alone, or power and only partial light. Sargant J. found as a fact that no circumstances existed which rendered it less costly or more profitable for the station to supply A. with power than to supply B. for the same purpose, and that the supply of energy and the circumstances in the two cases corresponded and were similar. He said (3): "Any supply of electricity for power is in the ordinary course taken quite separately from any supply for lighting"—that, of course, was referring to the regulations in that particular case—"namely, by a separate circuit connected with the mains by separate terminals and with a separate meter. And this being so, I think that according to any ordinary use of words the council must be said to be offering not a single supply of electricity but an alternative supply, and that any consumer taking for power and light in the ordinary way on separate circuits would be said to be taking not a single supply but two supplies, namely, a supply for power and a supply for light. And I can see no sufficient reason for cutting down the beneficial operation of s. 19 so as to prevent its application to each such separate supply. In my judgment the hypothetical consumer B., though taking a supply for power only,

(1) [1901] 2 Ch. 799, 811. (2) [1914] 2 Ch. 251, 263.
(3) [1914] 2 Ch. 261.

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is taking a supply corresponding with the like supply of energy to A. for power purposes, although A. may also be taking an additional separate supply for light. And if any differentiation is allowed between them qua their respective supplies for power it must be on the ground that the circumstances are not similar in the two cases." Then he added (1) what I venture to think was a most important statement: "Under each section I think that the whole circumstances may be considered from the broadest possible point of view, and that one question is whether the circumstances affecting consumer A. and consumer B. in relation to their supply of power are substantially dissimilar or sufficiently dissimilar to justify broadly the differentiation proposed." After referring to certain authorities the learned judge then continued (2): "I think a fairly clear distinction may be drawn for the present purpose between those reasons for making a lower or preferential charge which under legislation of this kind are legitimate and those which are illegitimate. It would seem that A. must not be charged less than B. merely to overcome a greater reluctance on the part of A. to become a customer, or to induce A. to become a customer in respect of another supply, although either of these reasons might be a good commercial reason for charging less to A. were the public undertakers merely carrying on any ordinary commercial business." Then he added the passage that I have already read: "On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply."

That decision was affirmed in the Court of Appeal (3), and Lord Cozens-Hardy M.R. said: "Suppose there are two factories, similar in situation, similar in extent, both of which are supplied with electricity for lighting and for power. Is there any reason for justifying different charges being made to the owners of those factories because one of them may have a portion of his factory, or another small factory, which is not supplied with electric lighting, but is supplied with gas, or acetylene gas, or whatever it may be? It seems to me that such a differentiation would be directly contrary to s. 19, which says that each of those two owners is to be

(1) [1914] 2 Ch. 262. (2) [1914] 2 Ch. 263.
(3) [1915] 1 Ch. 124, 128.

entitled to a supply on the same terms. They are not supplied on the same terms, although the circumstances are similar."

The decision in the Court below and in the Court of Appeal in that case was based on a finding or hypothesis of fact which rendered it impossible to contend successfully that the statute had not been infringed.

In the case before me, although the wording of the 1914 circular of the defendants, on which the action was launched, may be ambiguous, in the sense that the 20 per cent. for light in the case of the power consumers was not expressly stated to be limited to factory lighting, this was put right in the circular and scale of charges issued in 1916 before the date of the writ, and in practice the defendants have not allowed the user of the 20 per cent. in question for purposes other than the lighting of the factory or workshop taking the power supply, nor have they threatened or intended to do so, nor apparently has any one thought that such was the case; and I allowed an amendment of the pleadings referring to the 1916 circular in order that the case might be determined, and it has accordingly been argued on the true facts.

In the *Long Eaton Case* (1) the undertakers differentiated between different members of one class of consumers, namely, factory or power consumers, without, as found by the Court, any corresponding benefit accruing to the company or any legitimate reason existing for doing so. In the present case all power consumers are placed on the same basis; they all take one supply at the same rate or price per unit, and they are all allowed to use 20 per cent. of that supply for lighting their factories or workshops, which must be lighted by some means or other if they are to take power supply at all. A similar practice has been sanctioned by Parliament in the case of many power companies as explained in the evidence; that is to say, Parliament has sanctioned power companies competing with lighting companies in various districts on the terms that one-fifth of the supply taken by the power consumer may be used for light—this being based on the fact that factory and workshop lighting does not as a rule amount to or exceed one-fifth of the total amount of energy taken.

This treatment by the defendants of power consumers by avoiding

(1) [1914] 2 Ch. 251.

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(inter alia) the expenses of alternative or double supplies and extra wiring and meterage costs is not suggested to be otherwise than a sound commercial arrangement for dealing with the owners and occupiers of factories and workshops, and, by increasing the load and diversity factors at the station and the total energy consumed, must tend, as soon as power consumers are obtained in sufficient numbers, to improve the position and prospects of the undertaking, as it has long since done in Hackney, and is in my judgment a legal method of carrying on the undertaking.

The plaintiff contends that, qua the 20 per cent. used for lighting purposes, the power consumers are given an undue preference over the ordinary "light" consumers of the borough; but in my judgment the circumstances affecting the latter in relation to their supply are substantially different, and justify in the interests of the undertaking the differentiation, if such it can be called, in their treatment. All factory or power consumers are put upon one basis, all non-power consumers on another, and I think that the true test in the case of the power consumer must take into account his total factory consumption, and not the percentage of his supply that goes to meet one item only of his factory requirements. The 20 per cent. arrangement is really only a particular method of reducing or regulating what would otherwise be the charge per unit for power.

The plaintiff contends, and I think wrongly, that a light consumer who, as compared with a power consumer, has a bad load factor, little or no diversity factor, and whose consumption is relatively small, takes his light by way of "corresponding supply and under similar circumstances" if the light supply alone of the power consumer is considered. This is not, in my judgment, the fact, nor do I think that, for the purpose of considering ss. 19 and 20, the amount of the total consumption of the power consumer ought to be split up and only one portion of it considered for the purpose of deciding whether the power consumer himself, whose load factor is as a general rule better, whose diversity factor is necessarily better, and whose consumption is entirely different, takes a "corresponding supply under similar circumstances" and is unduly preferred as compared with the light consumer.

The plaintiff has called evidence for the purpose of attempting to show that in the year 1913—14, the last completed year before the

war, the power consumers were supplied by the defendants at a loss, and therefore that the test laid down in the *Long Eaton Case* (1) was not complied with. In the circumstances of the present case I do not think that this evidence is relevant to anything that I have to decide, nor do I think it establishes that the defendants did not profitably carry on their undertaking or that they supplied energy for power in the year in question at a loss. The defendants have called evidence in answer, and a great mass of figures and curves have been put in, and all I propose to say on this part of the case is that if the contention so raised on the evidence by the plaintiff is relevant he has not established the facts on which he relies in its support.

I will now deal with a series of hypotheses or propositions put forward on behalf of the plaintiff in reply, which it is also said bring this case within the decision in the *Long Eaton Case* (1) and establish that an undue preference is given by the defendants qua the 20 per cent. of energy taken by the power consumer, who avails himself of the option in question and uses it for light.

First, it is said that a factory owner in Hackney who takes light and no power pays more for his light than an owner of a similar factory who takes both. Why should he not? There is no magic in his having a factory as distinct from any other kind of building for which he takes light alone. The Act does not say that all owners of factories, independently of their circumstances and supply, are to pay the same rate, and this is simply the case of a light consumer and a power consumer as between whom, for the reasons I have stated, the undertakers are entitled to differentiate.

Secondly, it is stated the 20 per cent. in question is not equivalent to a reduction in the price of power to get the power consumer in as it does not reduce the charge for power because the consumer takes light, but only reduces the charge for light because the consumer takes power. This is plausible, but fallacious. What the station alone is concerned with is the quantum and diversity of the consumers' supply, and it is with the consumers as individual users that the statute is concerned. If one consumer takes a totally different supply under totally different circumstances to another consumer, it is irrelevant that he is allowed to allocate a portion of

(1) [1914] 2 Ch. 251, 263.

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his whole supply, which ex hypothesi he is entitled to at a lower rate, to a purpose similar to that to which another consumer, paying a higher rate because of the difference in his circumstances and supply, devotes the whole of his. This attempt to place the light consumer and the power consumer qua his 20 per cent. at Hackney in the position of two light consumers, corresponding to the two power consumers in the *Long Eaton Case* (1), is entirely misleading; in the *Long Eaton Case* (1) the two hypothetical consumers were found, in fact, to be power consumers whose supplies and circumstances were corresponding and similar, whereas in the present case the consumers contrasted differ in toto both as to supply and circumstances, and it does not alter the fact that the power consumer takes under different circumstances a different supply, for the whole of which he is entitled to a rate proportionate to his demand, that he uses one-fifth of his supply for light or for any other factory purpose.

Thirdly, it is said that, if you take the case of a power consumer lighting his factory by gas whose supply equals 100, all of which he uses for power, changing over to electric lighting without otherwise altering his factory, and then taking a supply of 125, his power position is not altered, and that he is getting a new light supply of 25 on terms different and unfair to the light consumers. This involves the same fallacy. When the consumer took his power supply of 100 he, in common with all other consumers of the same class, was entitled, if he had been so minded, to use 20 per cent. for light, and when he increased his total supply to 125 his relative position is in no way altered.

Fourthly, similar arguments were used with reference to a power consumer who before the 20 per cent. option was given used the defendants' energy for lighting and power, and after the change used the same amount for power and light, but it is said paid less for the latter. What he really pays less for is for the whole.

Fifthly, it is said that you must not mulct a light consumer because he will not take power. I agree. You must treat him as the defendants have treated all light consumers whose supplies and circumstances are similar, namely, on terms of equality.

For the reasons that I have endeavoured to give at some length, I am of opinion that no breach of the provisions of ss. 19 and 20 of

(1) [1914] 2 Ch. 251.

the Act of 1882 by the defendants has been established, and that they have not threatened or intended to supply energy otherwise than in accordance therewith. The action must therefore be dismissed, with costs to be paid by the relators.

G. R. A.

The plaintiff appealed. The appeal came on for hearing on November 29, 1917.

Colefax, K.C., and *Percy Wheeler*, for the appellant.

Walter, K.C., and *E. F. Spence*, for the respondents.

The arguments sufficiently appear from the report in the Court below and from the judgments.

Cur. adv. vult.

Dec. 18. SWINFEN EADY L.J. The relators complain that the defendants, who are empowered to supply electrical energy within their district, are committing breaches of ss. 19 and 20 of the Electric Lighting Act, 1882.

They complain that the defendants are supplying electrical energy for lighting on different terms, instead of the same terms, to persons taking under similar circumstances a corresponding supply contrary to s. 19. They also complain that the defendants are showing undue preference to persons taking current for lighting, who also take it for power, contrary to s. 20.

Astbury J. decided that the relators had failed to prove any breach by the defendants of the statutory provisions and dismissed the action, and the relators appeal.

The scale of charges of which they complain is set out in paragraph 5 of the statement of claim, and was contained in a circular issued by the defendants in July, 1914. The scale is as follows: "For lighting. Alternative No. 1. For any quantity of electrical energy used each quarter, not exceeding the equivalent of one hour's supply per day at the maximum demand 6*d.* per unit. For any further quantity of electrical energy used each quarter 1*d.* per unit." Then there is alternative No. 2, about which no question arises. "For any quantity of electrical energy used each quarter $3\frac{1}{2}d.$ per unit." Then scale B is: "For power. Alternative No. 1. A fixed charge of 1*l.* 0*s.* 0*d.* per quarter per kilowatt of maximum power

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demanded, and a charge for electrical energy used of $\frac{1}{2}d.$ per unit." Then there is this memorandum: "Consumers paying under this scale are allowed to use 20 per cent. of the energy consumed for lighting"; and then there is an alternative No. 2, also in this case for power, about which no question arises: "For any quantity of electrical energy used each quarter $1\frac{1}{2}d.$ per unit."

In October, 1916, and before the issue of the writ, the defendants issued a further circular in which they explained that customers paying under the B 1 scale for power were allowed to use not exceeding 20 per cent. of the total quantity of energy consumed for lighting the factory or workshop premises in which the motors are installed, provided that the whole supply is taken from the same service meter.

The action proceeded below upon the footing that the terms offered by the defendants were the terms in the first circular, as explained by the second, and that the purpose for which light could be used under the B 1 scale was limited to lighting the place for which energy for power was also being taken, and that the supply for both purposes should be taken through one and the same meter, without a separate circuit for the supply of light.

The plaintiffs do not make any complaint as to the defendants' charges for energy for lighting under paragraph A, or for power alone under paragraph B; their complaint is limited to the provision enabling power users, taking current under B 1, to consume up to 20 per cent. of the energy so taken, in lighting their factories. The substance of the plaintiffs' complaint can be put in very few words. They say that if two customers take from the defendants energy for lighting under what they allege to be similar circumstances, as for instance if two customers take current for lighting their factories and one has steam or gas engine motive power, and the other takes from defendants electric current for his motive power, the latter is able to obtain his lighting at a cheaper rate than the former. The plaintiffs contend that in such case both customers take energy for lighting under similar circumstances and ought to be charged at the same rate for such energy. The defendants dispute that both customers take current under similar circumstances, and contend that the customer who takes one combined supply for light and power, who takes at least four units for power for each unit for light, is a

better customer for the electric station and takes energy under different circumstances from one who takes for lighting only.

The plaintiffs' contention is that the defendants ought to have a third scale, namely, an intermediate scale between A and B, for customers who use current for light and power—higher than the scale charged to power users only, and lower than the scale charged to light users only.

In approaching the consideration of the matter in dispute it must be borne in mind that customers affect the central supply station differently according to the different circumstances under which they take current. The purpose for which current is taken is immaterial except so far as the station is affected by the amount taken and the circumstances under which it is taken. An ideally perfect customer would be one whose maximum demand on the station was also his minimum, and whose load remained constant and endured for each hour of the twenty-four and throughout the whole year of 8760 hours (365 days multiplied by twenty-four hours). The proportion which the number of units actually sold to any customer during the year bears to the number of units which would have been sold to him if his maximum demand had remained constant throughout the year is the "load factor" of the customer for that year. It is to the advantage of an electric light undertaking to have customers for energy during the day, so that when its plant is not being used to supply energy for light it may still be employed in an earning capacity by supplying energy for power. The plant must be capable of meeting the maximum demand upon it at any moment of the twenty-four hours, and the less the variable maximum demands made by different customers synchronize and the more evenly the aggregate demand of customers is spread over the twenty-four hours the smaller will be the size of the plant required to meet the maximum demand. What is termed the "diversity factor" is the proportion which the sum of the customers' maximum loads bears to the load actually observed at the station, and this depends upon how far the demands of customers are coincident—the less customers' demands coincide, the better for the station. Speaking generally, it is agreed that customers for power have a better "load factor" and more favourably affect the "diversity factor" of the station than customers for light. Their "load factor" is better

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as the number of units consumed by them bears a high ratio to their maximum demand. Indeed a figure of 25, or 25 per cent., was accepted as a general figure of "load factor" for power users, meaning that such a person would generally actually take about 25 per cent., or one quarter of the quantity which he would take if his maximum demand were continued throughout the twenty-four hours, for the entire year. The general figure given as the "load factor" of light users was 12·5. Again the "diversity factor" of the station is, speaking generally, more favourably affected by power users than by light users. There is great coincidence of demand among light users, who, speaking very generally, require light when darkness comes on and not before, and use it for about the same number of hours. With power users, on the contrary, there is much greater difference inter se as to their hours of work and the times when their maximum demand for power arises, and this smaller coincidence assists the power station. It is essential to bear in mind the effect of "load factor" and "diversity factor" on the working of an electric undertaking when considering the scale of charges. It appears that defendants' charge under scale A 1 for lighting is nearly double the charge under B 1 for power. Under A 1, if the unit be taken at 5*d.* for the purpose of calculating the cost of one hour's supply at maximum demand, and then all current consumed be charged at 1*d.* per unit, the annual charge per kilowatt of maximum demand will be 7*l.* 11*s.* 8*d.*, that is to say, four quarters multiplied by ninety-one day-hours at 5*d.* per unit, as against the fixed charge of 4*l.* per year per kilowatt for power. And the charge for current will be 1*d.* per unit for lighting and ½*d.* per unit for power. No complaint is made of these charges if enforced for light only or power only, as the case may be.

It is now necessary to consider the position of a power consumer who is allowed to use for lighting 20 per cent. of the energy he takes. Sir John Snell, the electrical engineer called by the plaintiffs, agreed that in so far as a power user consumes for lighting 20 per cent. of current taken his load factor is rendered worse than if he used all current taken for power alone, and that as a class a power user, although consuming 20 per cent. of current for light, has a better load factor, a better diversity factor, and is a better customer than one taking only current for

light; and he concurred in the view that the average price which should be paid by a consumer taking current for power and using part of it for light should be higher than is paid by a customer taking current for power only, and lower than is paid by a customer taking current for light only. The defendants point out that this is the effect of their automatic scale, and that in proportion as the load factor of a power user is rendered worse by his taking current for light, to that extent will he pay at a higher rate for all energy consumed, as the worse his load factor the higher the rate at which he pays for current taken. The table put in by Mr. Merz and marked C.H.M. 1 shows how this works out in the hypothetical instance taken: exactly in the proportion in which the load factor becomes worse, the smaller is the relative quantity of current over which the fixed charge has to be spread, and accordingly the cost per unit of current consumed rises in proportion. Down to this point I do not understand that the plaintiffs dispute the position. But they contend that this result is arrived at without considering another element, namely, the diversity factor; and they urge that if a customer taking power only has a similar load factor to the customer who uses current for both purposes they will both be charged at the same rate for all current taken, although, by reason of the latter customer adversely affecting the diversity factor of the station, he will be a worse customer than the one with the same load factor taking for power only. At most it comes to this—that, given two power users with the same load factor, one only using current for lighting, they pay at the same rate, and thus it is said lighting is given at a cheaper rate than if supplied to a customer taking current for lighting only. No doubt it is. In my opinion, however, a customer who takes current for power as well as lighting, being a more beneficial customer to the undertaking and taking at least four units for power for every unit for lighting, cannot be said to be taking a supply under the like circumstances as a customer who takes for lighting only. Indeed, the appellants conceded in argument that such two customers might be charged at different rates. What seemed to be the plaintiffs' real grievance is, not that two light users are charged at different rates, but that two power users are charged at the same rate through each having the same load factor, although one also uses part of his current for lighting. Mr. Colefax criticized

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the use which the defendants' counsel make of the table C.H.M. 1 and the way they dealt with it in argument; he contended that the table takes no account of the diversity factor, but merely shows that every power user pays according to his load factor, neither more nor less, because the difference of load factor is taken into account in the method of charging. It must be remembered, however, that we start with this, that using current for light as well as power renders worse the load factor; if, therefore, two power users have the same load factor, although one also uses current for light, it follows that without using current for light they would have had different load factors and as such would have been charged at different rates if worked out per unit consumed: it is only by reason of one of these customers also taking current for light, and so adversely affecting his load factor, that he is reduced to the same level of charge as the other customer who has a worse load factor than his own for power only. The effect of the sliding scale is that it does in fact introduce and adjust a third scale for power and light combined, the charge being higher than would have been the charge for power only and lower than would have been the charge for light only. The appellants have, in my opinion, failed to show any breach by the defendants of either s. 19 or s. 20 of the Act of 1882. The case of *Attorney-General* v. *Long Eaton Urban Council* (1) is clearly distinguishable from the present. In that case, where power and light were both taken, the charge was at a lower rate than when power only was taken, although the consumer was not so good a customer to the station. Again a difference was made when partial lighting only was taken, so that if any lighting was obtained from any other source the higher rate was charged. The *Long Eaton Case* (1) cannot govern the present.

In my opinion the appeal fails and should be dismissed.

WARRINGTON L.J. This is an appeal from a judgment of Astbury J. dismissing the plaintiff's action. The plaintiff is the Attorney-General at the relation of the Gas Light and Coke Company, and the defendants are the mayor, aldermen, and councillors of the metropolitan borough of Hackney empowered by Provisional Order and statute to supply electrical energy within a certain area.

(1) [1914] 2 Ch. 251; on appeal [1915] 1 Ch. 124.

The defendants are proposing to make to those consumers of electrical energy who employ it for both power and light a lower charge for the energy employed for lighting than they make to those consumers who use the energy for lighting purposes only. The plaintiff complains that in so doing the defendants are acting contrary to the provisions of ss. 19 and 20 of the Electric Lighting Act, 1882, and asks for a declaration to that effect and consequential relief. Sect. 19 of the Act is as follows: "Where a supply of electricity is provided in any part of an area for private purposes, then except in so far as is otherwise provided by the terms of the license, order, or special Act authorising such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances to a corresponding supply." And then s. 20: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, order, or special Act authorising them to supply electricity." It is contended that under s. 19 the defendants are bound to supply energy for lighting purposes to all consumers on the same terms unless in particular cases there are special circumstances justifying a differentiation, and that the mere fact that a person is using energy for power in the factory or workshop in which he also uses it for light is not a special circumstance justifying a differentiation in his favour. It is contended under s. 20 that by making such differentiation the defendants are showing an undue preference to those who consume the energy for both power and light over those who consume it for light only. In July, 1914, the defendants issued a circular defining their scale of charges for lighting and power supply. These charges were as follows: [His Lordship read the circular, and continued:] We are only concerned with alternatives No. 1 under heads A and B respectively. In October, 1916, the defendants issued a further circular modifying the charge under alternative No. 1 of head B. This circular is in the following terms: [His Lordship read it, and continued:] It in truth only expresses

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what the defendants meant by the previous circular, and their practice has always been in accordance with it. The effect is that consumers under scale B 1 if they use the energy for light also pay for that energy at a lower rate than if they were charged under scale A 1. It is common ground that in practice no more than 20 per cent. of the entire energy consumed would ever be used for lighting, so that a power user obtains the lower charge for all the energy consumed for lighting in the premises in which he also uses it for power. A similar question came before Sargant J. and afterwards before this Court in *Attorney-General* v. *Long Eaton Urban Council*. (1) The question there raised was determined in favour of the plaintiff, the proposal being to give to those users of energy for power who used it also exclusively for lighting a lower charge in respect of the use for power than that made to those users of energy for power who either did not use it at all for lighting or did not use it exclusively of other sources of light. The principles upon which such cases should be decided are thus stated by Sargant J. (2): "I think a fairly clear distinction may be drawn for the present purpose between those reasons for making a lower or preferential charge which under legislation of this kind are legitimate and those which are illegitimate. It would seem that A. must not be charged less than B. merely to overcome a greater reluctance on the part of A. to become a customer, or to induce A. to become a customer in respect of another supply, although either of these reasons might be a good commercial reason for charging less to A. were the public undertakers merely carrying on any ordinary commercial business. On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A. than B. constitute a legitimate reason for making a lower charge to A. for the same supply. And if the Court once came to the conclusion that some such circumstances existed, then proof would not be required that the diminution in the charge was precisely equivalent to the diminution in the cost of the supply." In that case there were not as between power users any circumstances which would render it less costly or more profitable to supply those users of energy for power who also used energy exclusively for light than to supply

(1) [1914] 2 Ch. 251; on appeal [1915] 1 Ch. 124.

(2) [1914] 2 Ch. 263.

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those who used energy for power alone or for that purpose and partial lighting, and accordingly the differentiation of the charge for power in favour of the former class was not justified. In this case we have to inquire whether the defendants are justified in making a differentiation in favour of those who use energy for both light and power in respect of its use for light as between them and those who use it for light only. It is conceded that users of energy for power as a class are entitled to be charged at a lower rate than those who use it for light alone. Their demand is not only spread over a larger number of hours in the day than is that of those who use energy for light only, but there is also a smaller degree of coincidence in demand in the one case than there is in the other. In technical language they are said to have a better load factor and more favourably to affect the diversity factor of the station. It is less costly and more profitable to the station to supply the one than the other, and consequently the lower charge may properly be made, and is, in fact, practically universal. I think it is made out that it is less costly and more profitable to supply power and light together than to supply light alone. In fact this is not disputed ; but it is said that it is not less costly or more profitable to supply energy for light to those who also use it for power than it is to supply it to those who use it for light only. In my opinion this is not the right way of regarding the matter. It is a commercial problem to be looked at broadly, and not with a meticulous examination as a question of mathematics of slight advantages or disadvantages in the manner of dealing with particular customers or classes of customers. My view may be shortly expressed. The consumers of energy for both power and light are better customers than those who consume it for light alone and are entitled to better terms, and I can see no reason why one of those terms should not be to give them what they use for light at a cheaper rate than is charged to others. It is said that they already get all the preference they are entitled to in the lower scale on which they pay for power, and that as users of energy for light also they are rather worse customers than those who use it for power alone. Suppose it to be so, I think there is sufficient evidence that the actual price per unit consumed is rather higher than that paid for power alone, and that the station therefore treats them slightly worse

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than it treats those who use energy for power alone. I think the plaintiffs fail to make out that the circumstances are the same in the case of the two classes in question, or that there is an undue preference of the one over the other. The fact is that the scale really differentiates between the charges made to three classes—those who use power alone, those who use light alone, and those who use both. In a broad commercial sense, and considered from the point of view of the station, the differentiation made is justified, and therefore is not contrary to the provisions of either of the two sections referred to.

I think the judgment of Astbury J. was right, and this appeal should be dismissed.

SCRUTTON L.J. The Attorney-General, on the relation of the Gas Light and Coke Company, who are interested in supplying gas for light and power in the borough of Hackney, brought an action against the municipal authority of the borough of Hackney, who supply electrical energy within the borough, asking for a declaration that the defendants' scale of charges for the supply of electricity was a breach of the 19th and 20th sections of the Electric Lighting Act, 1882, in that it made different charges to persons in similar circumstances for a corresponding supply, contrary to s. 19, and that it preferred one person to another, contrary to s. 20. Astbury J. decided that the plaintiff and relators had not proved any case of inequality or undue preference, and gave judgment for the defendants. The plaintiff and relators appeal to this Court.

To understand the points argued it is necessary to state briefly some of the business considerations which affect the profits of an undertaking for the supply of electrical energy and render a proposed customer more or less profitable to the undertaking. So far as the maximum demand at any time for electrical energy by a customer is not continued during the whole twenty-four hours, the fixed plant of the undertaking is not employed to its full efficiency and its capital is lying idle. The worth of a customer to the undertaking in one aspect can be measured by his actual demand of energy during the day as compared with the demand he would make if his maximum demand at any time of the day were continued for the whole day.

The difference between what he would demand if his maximum demand were continuous and what he does demand represents a period in which, as far as he is concerned, the plant is lying idle. A percentage calculation representing this comparison is called the " load factor " of the customer. Owing to the comparatively short period of the day in which light is required the load factor of the average consumer of electrical energy for light purposes may be taken at 12½ per cent., while owing to the longer period during which a factory using electrical energy for power is working the average power consumer has a load factor of 25 per cent. ; and the average power consumer is therefore in that respect a much better customer to the undertaking than the average light consumer. Power consumers may also light their factory by electrical energy. The effect of adding this demand for light for a short time to the demand for power for a longer time is slightly to depreciate or injure their load factor, which for an average light and power consumer may be taken at 22½ per cent.

The undertaking may view the matter from another standpoint. If the maximum demands of its customers all come at the same time, it has to provide fixed plant for the sum of the maximum demands. But to the extent to which some customers make their maximum demands at a period when other customers are not making demands the undertaking can provide a fixed plant less powerful than the sum of the maximum demands, and therefore lessen the amount of plant which would stand idle if all the maximum demands synchronized. This ratio of the sum of all the maximum demands during a given period to the amount of the maximum demand to be expected at the station at any one time in that period is called the " diversity factor " of the station. The light consumers as a class synchronize in their maximum demands, and the station gets very little advantage in its diversity factor if confined to them. The power consumers as a class vary in the time and amount of their demands, and the station does get considerable advantage in its diversity factor if confined to them. The consumer, however, has no diversity factor of his own. All that can be said is that by the period of time at which he makes his demand as compared to that of other consumers, or by the irregularity of his demand, he may improve the diversity factor of the station ; on the other

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hand, the period of his demand and its regularity may depreciate the diversity factor of the station.

The charges made by the Hackney Corporation for electrical energy are: A, for light, either (2.) a charge per unit of energy consumed, or (1.) a flat rate based on an hour's maximum demand, with a further charge for each unit consumed in excess; B, for power, either (2.) a charge per each unit consumed, or (1.) a flat rate for each kilowatt of maximum power demanded and a charge for each unit consumed. In this latter alternative the power user is allowed to use not more than a fifth of the total electrical energy taken for lighting his factory. This one-fifth represents the maximum amount likely to be used for lighting by a power factory, and in summer time the amount will be much less, and may be almost infinitesimal.

This being the Hackney scale, and the sort of considerations affecting it, the plaintiff says in the statement of claim that the defendants are making a higher charge to consumers taking electricity for lighting purposes only than to consumers taking electricity for power and for light. Of course they are. Why should they do otherwise? The light consumer has a load factor of $12\frac{1}{2}$ per cent.; the power and light consumer has a load factor of $22\frac{1}{2}$ per cent. That is to say, the light consumer will utilize a smaller proportion of the capacity necessary for his maximum demand than the power consumer. The power consumer will also take his energy at a time and with an irregularity that will improve the diversity factor of the station, which the electric light consumer will not. The power and light consumer will take at least four times as much energy as the light consumer. If it is said that the light consumer is being penalized if he does not take power, of course he is. For he is a customer of much inferior value to the customer who takes power as well. The charge to him is different because his circumstances are not similar to the power and light consumer. There is no preference, because the circumstances are different. If it is said from the relators' point of view that of two consumers requiring the same amount of electric energy for light one is charged a lower rate than the other because the one uses electricity for power and the other gas, of course he is. From the point of view of the electrical light undertaking the light and power consumer is much more profitable

than the consumer taking only light and not the increased quantity for power, which is taken at times more favourable to the electric light undertaking.

Counsel for the plaintiff admitted that the defendants were quite justified in charging the power consumer a lower rate than the light consumer. They also, I think, appreciated that this involved charging the power and light consumer a lower rate than the light consumer, especially when the light consumption was only ancillary to, and a small proportion of, the power consumption. For this reason during a considerable portion of the argument they changed their ground, and instead of comparing the light consumer with the light and power consumer they instituted a minute comparison between the power consumer and the power and light consumer, urging that the former ought to be charged a lower rate than the latter as the power consumer became a less profitable customer if he took light. There were several answers to this. It was not the case alleged in the pleadings. By the operation of the scale the power consumer did pay a lower rate per unit consumed than the power and light consumer. The energy used for light was ancillary to, and a very small proportion of, the energy used for power, and might be ignored for business purposes in its effect on the station. The sections of the Electric Lighting Act did not forbid broad general classifications without regard to minute differences of individual consumers. It was said the rate overlooked the diversity factor; but the individual consumer had no diversity factor, and while his consumption affected the whole diversity factor of the station, yet, because there was diversity, each consumer had a different effect, and there was no need to consider these special effects in arriving at the general rate. For these reasons, apart from authority, I come to the conclusion that the plaintiff's allegations entirely fail, and the judgment of Astbury J. should be affirmed for the reasons he gave as well as for those stated above.

But each side contended with great confidence that the judgments of Sargant J. and the Court of Appeal in *Attorney-General* v. *Long Eaton Urban Council* (1) conclude this case in their favour. I entirely agree with the passage (2) in which Sargant J. lays down the principle on which the Court should act in applying ss. 19 and 20

(1) [1914] 2 Ch. 251; [1915] 1 Ch. 124. (2) [1914] 2 Ch. 263.

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of the Act of 1882, with this qualification, which is indeed stated by the learned judge at p. 264, that the undertaking may charge the customer less to induce him to take another supply where taking that other supply will lower the cost to the undertaking of the existing supply.

In the *Long Eaton Case* (1) the corporation had a scale which charged two power consumers taking the same quantity of energy a different rate according as they did or did not take energy for light from the corporation. Taking light increased the business advantages of the customer, but the man who took light and power was charged a smaller rate than the man who took power only. This was clearly a preference, or unequal charge, not justified by any advantage to the undertaking in the circumstances. This is the position expressed by the Master of the Rolls in the Court of Appeal (2): "To take an instance which I should think is not uncommon, and which was put to counsel in argument: suppose there are two factories, similar in situation, similar in extent, both of which are supplied with electricity for lighting and for power. Is there any reason for justifying different charges being made to the owners of those factories because one of them may have a portion of his factory, or another small factory, which is not supplied with electric lighting, but is supplied with gas, or acetylene gas, or whatever it may be?" But in the present case all power users are charged the same rate, and the complaint is that a light user, a less advantageous customer to the undertaking, is charged a higher rate. The decision in this case is entirely in accord with the principles laid down as I understand them by the Courts in the *Long Eaton Case* (1), but the facts are different.

In my opinion the appeal fails and should be dismissed with costs.

Solicitors: *Monier-Williams, Robinson & Milroy; Harold George Downer.*

(1) [1914] 2 Ch. 251; [1915] 1 Ch. 124. (2) [1915] 1 Ch. 128.

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In re SWAIN.
BRETT *v.* WARD.

[1917 S. 1595.]

Will—Construction—"Issue" taking "the mother's share"—Residuary Gift—Ambiguous substitutional Gift—Unambiguous Gift over—Principle of Construction.

Where there is ambiguity in the terms of an original gift in a will, but no ambiguity in a subsequent gift over, the word of ambiguous meaning in the original gift will be construed by the light of its meaning in the gift over.

By his will a testator who died in 1898 directed his trustees to pay the income of his residuary estate to his wife for life, and on her death to realize and convert into money all his then residuary estate and divide the net residue into thirteen equal parts and pay two of such thirteen parts to each of his daughters absolutely; and in the event of the death of either of his daughters leaving issue he directed that "such issue shall take the mother's share in the distribution of my estate, if more than one in equal proportions as tenants in common," and in the event of the death of either of his daughters during the life of his wife without issue, the share of the deceased should be equally divided between his several surviving children and the issue of any deceased child, such issue, if more than one, taking as before directed. N. W., one of the testator's daughters, died in 1914, having had two children, one of whom had died in 1911 leaving two children. The testator's widow died in 1916, when the residuary estate became divisible:—

Held, that in the gift over the word "issue" was used in its strict and primary sense of "descendants," but in the earlier substitutional gift the meaning of the word was ambiguous, although, if standing alone, it might have come within the rule in *Sibley* v. *Perry* (1802) 7 Ves. 522 and been construed to mean "children."

Held, therefore, that the word "issue" in the earlier gift must be construed in the light of its unambiguous meaning in the gift over, and all the issue, in whatever degree, who survived any daughter who died in the lifetime of the tenant for life took equally between them the share which the daughter would have taken had she survived the tenant for life.

The rule in *Sibley* v. *Perry* (supra) discussed.

The principle of construction in *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, 883, adopted.

Adjourned Summons.

By his will, dated September 1, 1898, John Swain appointed his wife, Matilda Swain, his son-in-law the plaintiff Edwin Charles Brett, and Andrew Dargavel executors and trustees, and, after

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making dispositions of debentures in John Swain & Son, Limited, in favour of each of his six daughters therein named (including Nellie Ward, wife of Arthur Gilbert Ward) and directing payment of his debts and funeral and testamentary expenses out of his general residuary estate, he gave the residue of his estate and effects both real and personal to his trustees upon trust (subject to a proviso thereinafter contained empowering his trustees to continue the investment of part of his estate in John Swain & Son, Limited), to continue such other part of his estate as might be invested at the time of his death in its then state of investment for so long a time as his trustees might please, and to sell and convert into money all the residue of his estate, and invest as therein mentioned, and to pay the income of his residuary estate to his wife, Matilda Swain, for life, and upon further trust, at the death of his wife, to realize and convert into money all his then residuary estate other than the debentures and shares in the said company, and to divide the net residue of his estate into thirteen equal parts or shares, and as to his said shares and debentures to transfer and as to the residue of his estate to pay one of such parts to his grandson, John Swain, and to transfer and pay two other of the said thirteen parts to each of his before-named daughters for her own use and benefit absolutely; "and in the event of the death of either of my said daughters leaving issue I direct that such issue shall take the mother's share in the distribution of my estate, and if more than one in equal proportions as tenants in common; and that in the event of the death of my said grandson during his minority, or of the death of either of my said daughters during the life of my said wife without issue, the share of the deceased shall be equally divided between my several surviving children and the issue of any deceased child, such issue if more than one taking as before directed."

The testator died on September 12, 1898, and the will was duly proved by the executors therein named. Nellie Ward had two children only, Cyril Gilbert Ward and the defendant Horace Victor Ward.

C. G. Ward died on November 19, 1911, having had two children only, the defendants Cyril Brodwick Ward and Phyllis Tinabell Ward, who were both infants. The defendant Robert Bowie was the legal personal representative of C. G. Ward.

By her will, dated February 16, 1912, Nellie Ward appointed the defendant H. V. Ward and another executors and trustees, and after making certain dispositions not affecting the residuary estate of the testator gave all other her real and personal estate to her trustees upon trust to convert the same into money and pay the net proceeds, as to one-half to H. V. Ward and as to one-fourth to her grandson C. B. Ward, and as to the remaining one-fourth to her granddaughter P. T. Ward, absolutely.

Nellie Ward died on October 3, 1914, and Matilda Swain, the tenant for life, on December 24, 1916, when the residuary estate of the testator, amounting to 78,000*l.*, became divisible.

On July 30, 1917, the plaintiffs, as the surviving executors and trustees of the will of J. Swain, took out a summons asking whether, according to the true construction of the will, and in the events which had happened, the defendant H. V. Ward was now absolutely entitled to the two thirteenth parts of the residuary estate directed to be paid and transferred to Nellie Ward, or who was now entitled to the same two thirteenths.

The first question argued on the construction of the will was whether the words " in the event of the death of either of my said daughters leaving issue " meant death in the lifetime of the testator or death prior to the period for distribution on the death of the tenant for life.

Stafford Crossman, for the executors and trustees.

Owen Thompson, for H. V. Ward, the first defendant. The " death " leaving issue means death prior to the death of the tenant for life : Theobald on Wills, 7th ed. pp. 660, 705, 706 ; *Bryden* v. *Willett* (1) ; *In re Watson's Trusts* (2) ; *Duffill* v. *Duffill* (3) ; *In re Musther*. (4)

Maugham, K.C., and *J. G. Joseph*, for the infant grandchildren of Nellie Ward. The " death " referred to is death in the lifetime of the testator. Nellie Ward took an absolute vested interest in the two-thirteenth share. Until this point is determined the question of the meaning of issue cannot be argued.

(1) (1869) L. R. 7 Eq. 472.
(2) (1870) L. R. 10 Eq. 36.
(3) [1903] A. C. 491.
(4) (1890) 43 Ch. D. 569.

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EVE J. held that on the true construction of the will the event contemplated by the testator was the death of a daughter in the lifetime of the tenant for life, either leaving issue or without leaving issue; it was not limited in the first case to a daughter dying in the lifetime of the testator. Nellie Ward's share, therefore, went to her "issue."

The question as to the meaning of "issue" taking "the mother's share" was then argued.

Maugham, K.C. Our submission is that this fund goes per capita in thirds to the first defendant and the two grandchildren of Nellie Ward. The "issue" are to take "the mother's share," not "their" mother's share. The phrase as used in this will is really descriptive of the subject-matter of the gift and applies to the different shares distributively in succession. "Issue" therefore in this gift is not limited to children. In legal phraseology the word primarily means "descendants," and is only to be read otherwise where the context requires it. No general rule was intended by Lord Eldon to be laid down in *Sibley* v. *Perry* (1), but on the construction of that will, where "issue" was used in connection with parent, it was held to mean children. Brett L.J. in *Ralph* v. *Carrick* (2) said that he would have no objection to be present at the funeral of *Sibley* v. *Perry*. (1) There appears to be no case exactly like the present as to the words used: Jarman on Wills, 6th ed. p. 1596. *In re Kavanagh's Will* (3) is the nearest, and "issue" was there held to mean all descendants. The principle there laid down is applicable here. In *Ross* v. *Ross* (4) "issue" in reference to "parent" in a substitutional gift was held not limited to children.

[EVE J. referred to Jarman on Wills, 6th ed. p. 1598.]

Is it conceivable that the testator can have meant to cut out the infant grandchildren here for the benefit of their uncle?

Owen Thompson, for the first defendant. "Issue" here means "children," and H. V. Ward is entitled to the whole. There are numerous cases where the gift was to issue taking "their parent's share," or a parent's share, or "their respective parent or parents'"

(1) 7 Ves. 522.
(2) 11 Ch. D. 873, 884.
(3) (1862) 13 Ir. Ch. Rep. 120, 125.
(4) (1855) 20 Beav. 645.

share, such as *Pruen* v. *Osborne* (1) and *Smith* v. *Horsfall.* (2) In those and similar cases the presence of such expressions was held sufficient to confine the general meaning of " issue " to " children." In *Ralph* v. *Carrick* (3) the gift was to " descendants " who were to be entitled to the benefit which their deceased parent would have received, and " descendants " was held to be a less flexible word than " issue," and required a stronger context to confine it to children. That case is therefore distinguishable. *Sibley* v. *Perry* (4) was discussed in it by the three Lords Justices, and the general rule there laid down was recognized but held to be inapplicable. In *Martin* v. *Holgate* (5) " issue " was held to mean children where the direction was that " issue " were to be entitled to " their father's or mother's share." The last case on the lines of *Sibley* v. *Perry* (4) is *In re Timson* (6), where the rule in *Sibley* v. *Perry* (4) was approved and applied and " issue " held to be confined to children. As soon as the word " mother " is inserted in a will in connection with issue taking her share it is really immaterial whether it is " a," " the," or " their " mother's share. The present case comes within what is really the rule in *Pruen* v. *Osborne* (1), and there is the requisite allusion to the parent.

EVE J. This case is one of a class constantly coming before the Courts involving the true meaning to be attached to the word " issue," so frequently used by testators without any appreciation of the difficulties they may be thereby giving rise to. Although I have arrived at a clear opinion as to the proper construction of this will, I need hardly say I express it with a great deal of diffidence in the face of the various decisions to which my attention has been called. I have already held that by the clause under consideration the testator is dealing with the contingency of the death of a daughter in the lifetime of his widow alternatively leaving or without leaving issue. In the former case the daughter's share is given by way of substitution " to such issue "; in the latter case it is given over " to be divided equally between my several surviving children and the issue of any deceased child, such issue if more than one taking

(1) (1840) 11 Sim. 132.
(2) (1858) 25 Beav. 628.
(3) 11 Ch. D. 873.
(4) 7 Ves. 522.
(5) (1866) L. R. 1 H. L. 175.
(6) [1916] 2 Ch. 362.

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as before directed "—that is, taking as tenants in common. In such circumstances I think the conclusion is almost inevitable that the testator has used the word " issue " in the same sense throughout the whole clause. That would seem to be the natural conclusion according to the judgment of the Master of the Rolls in the last case cited by Mr. Owen Thompson (*In re Timson* (1)), and, regarding first the terms of the gift over, it is hardly conceivable that the word is used there with any other meaning than its primary one. To restrict it to children of a daughter in this clause would in my opinion be to defeat the intention of the testator to benefit the daughter and her stock. If such restriction be imposed on the word although there were grandchildren of the daughter, great-grandchildren of the testator, in existence, they would be excluded from any benefit under the gift over, and in this clause alone I cannot see anything to justify the imposition of a secondary meaning on the word.

I hold, therefore, that, looking at the terms of the gift over alone, the word is used therein in its strict and primary sense, extending to all descendants. But, as has been pointed out in nearly every one of the cases referred to in the argument, the construction of this and other clauses in a will cannot be finally determined without due regard to the context in which they are found. Wrenched from its surroundings, a sentence may convey a meaning quite different from that to which it bends when restored to its original context. The question I have to consider is whether the meaning I have attached to the word in the gift over looked at alone is controlled or altered when the terms of the substitutional gift which immediately precedes are considered. In this inquiry I must bear in mind that " before I can restrain that word from its legal and proper import I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense " : see per Knight Bruce V.-C. in *Head* v. *Randall.* (2) The substitutional gift, which is the one I have to interpret, as the daughter with whose share I am dealing died in the lifetime of the widow leaving issue, is in these terms : " And in the event of the death of either of my said daughters leaving issue I direct that such issue shall take the mother's share in the distribution of my estate, and if more than

(1) [1916] 2 Ch. 362. (2) (1843) 2 Y. & C. Ch. 231, 235.

one in equal proportions as tenants in common." Now here, again, I am inclined to think that if that clause stood alone, if one removes it from its context, there is a great deal in it which can be relied upon as bringing it within what has been spoken of as the rule in *Sibley* v. *Perry*. (1) I am not prepared to say, even if looked at alone, it would necessarily be brought within that rule. The rule is that a direction that the issue shall take only the share which "their parent would have taken" or "their parent's share," or "the shares of their respective parents" restricts the meaning of "issue" to children, the words "parent" or "parents" being interpreted as "father," or "mother," or "father and mother." Whether, therefore, in a case of a daughter's share the word used be "parent" or "mother" makes no difference, as in each case where the rule is applied it is on the footing that the association of "parent" and "issue" connotes the direct relationship of parent and child, and restrains the meaning of the word "issue" accordingly.

It is to be observed that I have not here what was present in many of the cases, the possessive pronoun before the word "mother" or "parent." It is not "his or their parent" or "their parent," but it is "the parent." In no case that has been cited does that combination, "the parent," appear to have occurred, though in one case the expression is "a parent's share," which in some respects may be more in favour of the conclusion for which Mr. Owen Thompson has argued. I think it is arguable that "the mother's share" ought to be read as descriptive of the subject-matter of the gift and no more than equivalent to "my said daughter's share," in which case it would not necessarily have the same restraining effect on the word "issue." At most I think I can say that this substitutional gift is one of ambiguous meaning. It may, and, standing alone, I think I may go so far as to say it probably would, be construed as falling within the rule I have stated. But, in that state of uncertainty, what principle of construction is there to which I can have recourse for the purpose of imposing upon this gift its proper meaning? I think the salutary principle is stated emphatically by each of the Lords Justices in *Ralph* v. *Carrick*. (2) James L.J. says: "It is one of the most settled, and appears to me one of the most reasonable rules of construction, that where there is a gift

(1) 7 Ves. 522. (2) 11 Ch. D. 873, 883, 885, 888.

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over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons." Then Brett L.J. at the conclusion of his judgment says, speaking of *Ross* v. *Ross* (1): "It is an authority for holding that where the word 'issue' is used in its more extended meaning in the gift over, that more extended meaning is to be carried back to the former part of the will, though the word is there in collocation with parents, and that the case is thus taken out of the operation of the rule in *Sibley* v. *Perry*." (2) And finally Cotton L.J. says: "I think it is a sound principle that when there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words contained in the previous gift so as to agree with the unambiguous words contained in the gift over."

Having, therefore, arrived, rightly or wrongly, at the conclusion that there is no ambiguity in the gift over here, and being of opinion that there is an ambiguity in the terms of the original gift, I think I ought to apply the principle invoked by the Court of Appeal and to construe the word in the original gift by the light of its meaning in the gift over. Accordingly I hold that, upon the true construction of this will, all the issue, in whatever degree, who survived any daughter who died in the lifetime of the tenant for life take equally between them the share which the daughter would have taken had she survived the tenant for life. On that conclusion, in the events which have happened, the share in question will go in equal thirds to the three defendants Horace Victor Ward, Cyril Brodwick Ward, and Phyllis Tinabell Ward.

Solicitors: *Ashley, Tee & Sons; Patersons, Snow & Co., for K. & W. Daniel, Ramsgate; Mowll & Mowll, for Mowll & Mowll, Dover.*

(1) 20 Beav. 645. (2) 7 Ves. 522.

G. M.

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Jan. 24, 25; *Feb.* 8.

In re POWELL.

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[1917 P. 592.]

Will—Construction—Residuary Gift—Ultimate Trust, by Reference to a Settlement, to Testator himself absolutely—Lapse—Intestacy.

By a settlement made on August 13, 1862, the testator covenanted to pay certain sums to trustees, and declared trusts of the same in favour of his daughter A. M. C. and her husband and children, and directed that if there should be no child who should attain a vested interest, the trustees, after the death of A. M. C. and such failure of children, should stand possessed of the trust premises in trust for the testator, his executors, administrators, and assigns, for his and their absolute benefit.

By his will made in 1875 the testator devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion, and to stand possessed of an undivided moiety of the clear residue of his estate and the proceeds of sale thereof to such and the same or like uses, trust, intents, and purposes and subject to such and the same like powers, provisoes, "and with the like remainders over" as were declared in favour of his daughter A. M. C. and her children by the indenture of August 13, 1862; and as to the other moiety for similar uses, intents, and purposes in favour of another daughter, L. E. P., and her children. The testator died in 1880, and his daughter A. M. C. in 1915 a widow and without ever having had any issue:—

Held, that it was impossible to say what the testator meant by the irrational gift in remainder, and, in the events which had happened, he died intestate as to the capital of this moiety of his residuary estate.

In re Palmer [1893] 3 Ch. 369 and *In re Currie's Settlement* [1910] 1 Ch. 329, 334, applied and followed.

ADJOURNED SUMMONS.

The plaintiff, Arthur John Bodvel-Roberts, was the sole acting trustee of the will of the testator, Edward Griffith Powell. The first defendant, Charles Edward Hamilton Poole, and the second, third, and fourth defendants were the persons entitled to the residuary real and personal estate of the testator except such parts as were undisposed of by his will. The testator's widow, Helena Catherine Powell, and the rest of the defendants except the last were persons interested in such parts of the real and personal estate of the testator as were undisposed of by his will. The last defendant, Griffith Lloyd

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Roberts, was a trustee of the testator's will who ceased to act in 1908, but had not been formally discharged.

By an indenture dated August 13, 1862, and made between the testator, Edward Griffith Powell, of the one part and certain persons as trustees of the other part, trusts of two sums of 5000*l.* and 3000*l.* which the testator thereby covenanted to pay to the trustees were declared in favour of his daughter Amelia Maria Clemenger, of any husband who might survive her, and of her children as therein mentioned, and it was thereby declared that if there should be no child who should attain a vested interest in the trust premises the trustees, after the death of the said Amelia Maria Clemenger and such default or failure of her children, should stand possessed thereof in trust for the testator, his executors, administrators, and assigns, for his and their absolute benefit. By his will, dated February 17, 1875, the testator devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion, and, after declaring trusts affecting part of the proceeds of such conversion, directed that his trustees should stand possessed of an undivided moiety of the clear residue of his estate and effects, and the proceeds of sale thereof, " to such and the same, or like uses, trusts, ends, intents, and purposes, and with, under and subject to such and the same, or like powers, provisoes, declarations, and resolutions, and with the like remainders over as are expressed or declared in favour of my daughter Amelia Maria Clemenger and her children in and by " the indenture of August 13, 1862 ; and as to the other or remaining moiety to and for uses, intents, and purposes in favour of his daughter Louisa Elizabeth Poole and her children under and pursuant to which it passed, in the events which have happened, to some of the persons who were respondents to the summons.

The testator died on November 30, 1880, and his daughter Mrs. Clemenger died a widow and without ever having had any issue on October 28, 1915.

Louisa Elizabeth Poole died on June 25, 1915, a widow having had five children, of whom the eldest was Charles Edward Hamilton Poole. The second and third defendants were also children of this marriage, and had attained twenty-one ; the other two children died under twenty-one and unmarried. By her will she appointed the plaintiff and one of the defendants executors. The testator's

heir-at-law at the time of his death was his son the Rev. Edward Parry Powell, and the persons who would have been entitled to his personal estate under the Statute of Distributions if he had died intestate were his widow, the defendant Helena Catherine Powell, and his three children, Edward Parry Powell, Amelia Maria Clemenger, and Louisa Elizabeth Poole.

By an originating summons taken out by the plaintiff the question was asked, inter alia, (4.) whether, on the death of Amelia Maria Clemenger (widow) without having had a child there was an intestacy as to the moiety of the residuary estate of the testator to the income of which she was entitled for her life, or whether such moiety passed to the children of Louisa Elizabeth Poole who being sons attained twenty-one or being daughters attained that age or married under it. Question 3 of the summons, which asked whether in the events which had happened a trust for sale in the will of the testator was still subsisting, was postponed to the decision on question 4.

Ward Coldridge, K.C., and *G. E. Cruickshank*, for the plaintiff, stated the facts and question 4.

Clayton, K.C., and *Percy Wheeler*, for the first defendant, C. E. H. Poole. There is no decision applicable to the precise words of the gift over in this case. We submit that there is no intestacy of this moiety. The principle is clear that intestacy depends upon the absence of disposition in a will, and if there is anything equivalent to a disposition, that gets rid of intestacy. Here there was a clear disposition upon the uses and trusts " and with the like remainders over " as were expressed in the settlement of August 13, 1862. The ultimate trust in that settlement, in the events which have happened, was for the testator, " his executors, administrators and assigns, for his and their absolute benefit." The case comes within the principle of *In re Palmer* (1), though not within its precise terms. That case expressly overruled *Humble* v. *Shore*. (2) We also rely upon *In re Ballance* (3), *Crawshaw* v. *Crawshaw* (4), *In re Allan* (5), and *In re Wand*. (6)

J. W. Manning, for H. R. A. Poole (by his guardian ad litem) and

(1) [1893] 3 Ch. 369.
(2) (1847) 7 Hare, 247.
(3) (1889) 42 Ch. D. 62.
(4) (1880) 14 Ch. D. 817.
(5) [1903] 1 Ch. 276.
(6) [1907] 1 Ch. 391.

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two other respondents in the same interest. I adopt the same arguments and rely on the same cases. *In re Whiting* (1) is also instructive. That case and *In re Palmer* (2) are illustrations of how far the Courts will go in order to avoid an intestacy.

Maugham, K.C., and *L. W. Byrne*, for the widow, Helena Catherine Powell. Our submission is that there was an intestacy as to this moiety. It is said that, construing the will strictly and inserting the remainders in the settlement, this moiety of the estate would pass to the testator and so under the will again. But this is merely the case of a share of residue which has lapsed, and there is no indication of intention that it is to go back into the residue. It is undisposed of. The two learned counsel who in 1880 were consulted upon the construction of this will advised that there was an intestacy, and *Humble* v. *Shore* (3) was not even referred to in their opinions, although other cases were quoted on the point. It was deemed inapplicable. No phrase is used here expressing a definite intention; it is only "with the like remainders over." It is absolute conjecture as to the real intention of the testator that the other daughter and her children were to benefit. When the will was made *Humble* v. *Shore* (3) was a binding authority, but now it is not.

It is impossible to conceive that the testator intended this gift to have the irrational operation which is contended for. Ever since the opinions of counsel were taken the trustees have acted upon the footing that there was an intestacy as to this moiety.

E. P. Hewitt, K.C., and *Leonard Mossop*, for Maud Clemenger, spinster, and Adrian Stokes, representing two of the next of kin of the testator. We also contend that there is an intestacy. In order to take under a will the beneficiary must survive the testator: *Underwood* v. *Wing*. (4) The case of *In re Currie's Settlement* (5) is in our favour. Joyce J. there said that if the ultimate limitation in that case had been simply for some person A. who was living at the date of the will, but afterwards died in the lifetime of the testator, it was clear that the trust for it under the will, created by reference to the trusts of the settlement, must have failed by lapse. That applies to the present case. Here there are no words similar to

(1) [1913] 2 Ch. 1.
(2) [1893] 3 Ch. 369.
(3) 7 Hare, 247.
(4) (1854) 19 Beav. 459.
(5) [1910] 1 Ch. 329.

those used in *Humble* v. *Shore* (1), and it is neither expressly nor impliedly directed that the share is to form part of the testator's residuary estate.

A. L. Ellis, for G. L. Roberts, a trustee of the will and settlement who had not acted since 1908, but had not been discharged. I submit that there is an intestacy. It is the ordinary case of a lapsed share of residue.

Clayton, K.C., in reply on the cases cited.

Cur. adv. vult.

Feb. 8. EVE J., after stating the terms of the indenture of August 13, 1862, and of the will of the testator dated February 17, 1875, as above set out, continued: The question is, Did the testator die intestate in respect of the moiety of his residuary estate of which Mrs. Clemenger was tenant for life, or was the same bequeathed to the persons interested in the other moiety? The point was raised within a few weeks of the testator's death, and before his will was proved the executors therein named took the separate opinions thereon of the late Sir Joseph Chitty (then Mr. Chitty, Q.C.) and of the late Mr. Jasper Peck. Both advised that in the event of Mrs. Clemenger's death without issue her moiety would be undisposed of, and on the faith of these opinions the trustees, satisfied that Mrs. Clemenger would never have any issue, have dealt with the moiety as a lapsed share of residue. Since the death of Mrs. Clemenger doubts have been expressed whether the correctness of these opinions can still be maintained, seeing that in the meantime the decision in *Humble* v. *Shore* (1) has been overruled and held to be bad law. This attitude of necessity presupposes that the opinions are based on the authority of *Humble* v. *Shore*. (1) I very much doubt whether there is any sufficient ground for this assumption. The case is not referred to in either of the opinions, and if Mr. Chitty —who cites three cases in support of that part of his opinion in which he indicates the respective destinations of proceeds of realty and personalty under the intestacy—really founded his opinion that there would be an intestacy in the event mentioned on *Humble* v. *Shore* (1) it is very remarkable that he should not have made any allusion to the case of *Crawshaw* v. *Crawshaw* (2), which he had

(1) 7 Hare, 247. (2) 14 Ch. D. 817.

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argued only a few weeks before giving his opinion, and in which Sir George Jessel, after passing some very trenchant criticisms on the reasoning in *Humble* v. *Shore* (1), had eventually found a sufficient pretext for distinguishing the case he was deciding from *Humble* v. *Shore* (1) and thereby avoiding the necessity of following that case. I am justified, I think, in saying this by Lindley L.J.'s statement in *In re Palmer* (2) that in *Crawshaw* v. *Crawshaw* (3) Sir George Jessel, while reluctantly treating *Humble* v. *Shore* (1) as an authority, relied on very slender and scarcely perceptible grounds for distinguishing it from a case closely resembling it. However, it is not necessary that I should pursue these matters further, because the question whether the moiety has lapsed or is given over to the other residuary legatees is now submitted to the Court for adjudication, and I must deal with it as the law now stands and without regard to the advice formerly given to the trustees, and to any different conditions which may have then prevailed. What, then, is the ultimate remainder to be read into the testator's will in respect of this moiety? It is "for myself, my executors, administrators and assigns absolutely." What is the meaning of such a bequest? Joyce J. in *In re Currie's Settlement* (4) says: "A bequest by a testator of a share of residue either immediately or after preceding limitations to himself, or to himself, his executors, administrators, and assigns, would, in my opinion, be meaningless and inoperative for any purpose. No rational testator or draftsman ever intentionally framed such a limitation." In the main I agree with those observations, and, although they do not dispose of the point with which I have to deal, they indicate a very strong reason for doubting whether this testator had any idea when he made his will what the ultimate remainder of the settled funds was in the event of his daughter dying without issue—a doubt which is strengthened by the fact that he does not appear to have had the deed of August 13, 1862, before him at the time, for he leaves the date thereof in blank. When a man purports to bequeath his own property to himself the position approaches the farcical. I do not think it is too much to say that he is acting as no rational testator would, and I certainly should hesitate a long time before treating so irrational a disposi-

(1) 7 Hare, 247.
(2) [1893] 3 Ch. 372.
(3) 14 Ch. D. 817.
(4) [1910] 1 Ch. 329, 334.

tion as equivalent to a direction that the subject-matter of it is to fall into residue again, or even as an expression of a deliberate intention not to die intestate. Speaking for myself, and apart from authority, I do not see why any different result should follow in the case of an irrational gift "to myself, my executors, and administrators" than would follow in the case of a gift to "A. B., his executors and administrators" in the event of A. B.'s death in the testator's lifetime. Even assuming that in each case the gift can be relied on as showing that the testator did not contemplate intestacy, events have been too strong for him and his gift lapses. In support, however, of the argument that there is no intestacy, that the gift in remainder is, to quote an expression used in the course of the arguments, "the negation of an intention to die intestate," reliance has been placed on the decisions in *In re Palmer* (1), which I have already cited, *In re Allan* (2), *In re Wand* (3), and *In re Whiting* (4); but the result in each of these cases was arrived at, as it seems to me, not because the disposition of the share negatived an intention to die intestate—for, as I have already indicated, that must always be the case where an attempt is made to dispose of the whole residue—but because the disposition was so expressed as to make the testator's intention to give the share over quite plain. In *In re Palmer* (1) Lindley L.J. puts it: "By his will and codicil, taken together, he has given this share after her death to his other residuary legatees. . . . . This being the testator's plain intention, sufficiently expressed to enable the Court to see it, the Court ought to give effect to it." In *In re Allan* (2) the instruments and facts were really indistinguishable from those in *In re Palmer* (1), and the case was treated as completely covered by the earlier decision. *In re Wand* (3) carries the matter no further, and in *In re Whiting* (4) Joyce J., in holding that the principle of *In re Palmer* (1) was applicable, says: "In the present case can any lawyer, or other rational being, entertain any doubt as to what was the intention of the testator?" And in a passage a little farther on he adds: "Not only, in my opinion, is it impossible to doubt what the testator really intended; but, to my mind, the meaning of what he says—of the words used—is perfectly plain to any mind unprejudiced by the consideration of

(1) [1893] 3 Ch. 369, 374.
(2) [1903] 1 Ch. 276.
(3) [1907] 1 Ch. 391.
(4) [1913] 2 Ch. 1, 6.

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other cases. Still, if there were any real ambiguity, and I had to choose between two possible constructions, I should prefer the one which, in my opinion, plainly would effect the intention of the testator, to one which would have the effect of frustrating that intention. In my opinion, the meaning of this will, read together with the codicil, is perfectly plain." In the case with which I am dealing I find it quite impossible to say what the testator meant by this irrational and futile gift in remainder. I doubt if he ever realized that he had made it, and I hold that, in the events which have happened, he died intestate as to the capital of this moiety of his residuary estate. It passes, therefore, in accordance with the opinions already obtained by the executors, and the costs of all parties to this summons must be taxed as between solicitor and client and paid and retained out of the real and personal estate comprised in it, rateably, according to their respective values on October 28, 1915. There will be liberty to apply as to question 3 of the summons.

Solicitors: *Huntley & Son, for Breese, Jones & Casson, Portmadoc; Langlois, Harding, Warren & Tate, for Mayo & Son, Yeovil; Hind, Sons & Roberts, for Bryan & Armstrong, Mansfield; Whitfield, Byrne & Dean, for Carter, Vincent & Co., Carnarvon.*

G. M.

MEEK *v.* PORT OF LONDON AUTHORITY.

ASTBURY J.

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Feb. 4, 5, 6.

[1917 M. 1019.]

Master and Servant—Contract of Service—Special Trade Usage—Universality—Payment of Salaries free of Income Tax—Implied Term of Contract—Servant unaware of Usage on entering Employment—Alteration of Usage by Master—Subsequent Promotion of Servant to higher Class—New Contract—Port of London Act, 1908 (8 *Edw.* 7, *c.* 68), *s.* 60.

Sect. 60 of the Port of London Act, 1908, under which servants of dock companies transferred to the Port Authority hold their office upon like "terms and conditions" as under the dock companies, only applies to obligatory terms and conditions.

Payment of income tax on servants' salaries is prima facie a bounty that can be discontinued.

A trade usage cannot be annexed to a contract of service, unless the servant was aware of it on entering the employment.

Promotion to a higher class of employment constitutes a new contract of service.

WITNESS ACTION.

Under and by virtue of the Port of London Act, 1908, s. 3, the undertakings of the London and India Docks Company, the Surrey Commercial Dock Company, and the Millwall Dock Company were on March 31, 1909—the appointed day under s. 49—transferred to the defendants (therein called the Port Authority), and by s. 60 the plaintiffs, who were employees of the London and India Docks Company, became employees of the defendants.

Sect. 60, sub-s. 1 (*b*), provides that every officer and servant of the several dock companies shall, as from the appointed day, become an officer or servant of the Port Authority, and shall hold his office or situation by the same tenure and upon like terms and conditions (including all conditions regarding pension or other superannuation allowance) under the Port Authority as he would have held the same under the body from whom he is transferred if this Act had not been passed, and while performing the same duties shall receive not less salary, wages, or pay than he would have been entitled to if this Act had not been passed.

It was admitted for the purpose of this action that the London and India Docks Company had paid all income tax assessed or payable in respect of salaries and wages which at any time rendered

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an officer or servant liable to be assessed, and the plaintiffs, who subsequent to the transfer had become liable to assessment, applied to the defendants to pay their tax.

On the defendants refusing, the plaintiffs commenced this action on June 15, 1917, alleging that it was a term and condition of the employment of every officer and servant employed by the London and India Docks Company at the date of transfer that any income tax assessed or payable in respect of salary or wages should be paid by the dock company, and claiming a declaration that under s. 60 the defendants were liable to pay this tax.

At the date of transfer the plaintiff Meek was a fourth-class clerk receiving the maximum fourth-class salary of 120*l.* On January 1, 1910, this was specially raised to 150*l.* The plaintiffs Buckley and Laing were third-class clerks receiving the then maximum third-class salary of 150*l.* each. The plaintiff Hills was a first-class foreman receiving the maximum salary of 2*l.* 10*s.* a week, or 130*l.* a year. These salaries being below 160*l.* were not then assessable.

On March 23, 1911, the defendants issued an official circular to the whole of the transferred staff in the following terms: "The Authority have decided to discontinue the practice of paying the income tax on salaries and wages, and in the case of those officers and servants who are entitled under the conditions of their service to receive their present salaries or wages free of income tax a lump sum calculated on the average of the tax for the last ten years will be paid on March 1 in each year in commutation of the tax."

Following on this circular a printed form of agreement was handed to each assessable member of the transferred staff whose income tax was then being paid by the defendants. The form was as follows: "In consideration of your paying me the sum of *l.* on March 1 each year during which I shall be in your employment in addition to my salary for the time being I agree henceforth to pay all income tax payable upon my salary." The sum mentioned was calculated on the average rate of tax in force during the previous decade. This agreement was signed by most of the assessable members, but it was not sent to or signed by the plaintiffs, who were not then assessable. The defendants continued to pay the tax for the six assessable members who had not commuted, but only on the basis of their salaries at the date of the circular.

On October 1, 1912, the plaintiff Meek was promoted to a third-class clerkship at a salary of 175*l.* rising by 12*l.* 10*s.* a year to 200*l.* On July 1, 1912, the plaintiffs Buckley and Laing were promoted to second-class clerkships at salaries of 170*l.* rising by 10*l.* a year to 200*l.*

On December 1, 1911, the plaintiff Hills' salary was raised to 2*l.* 12*s.* a week, or 135*l.* 4*s.* a year, the class maximum being increased to that amount. On February 22, 1915, he received a war bonus of 3*s.* a week; on July 13, 1916, a second war bonus of 3*s.* a week, and on April 26, 1917, a third war bonus of 6*s.* a week. By the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 21, the exemption limit was reduced to 130*l.*, and for the year 1915-16 and onwards the plaintiff Hills became assessable on the excess of his income over 120*l.*

On July 3, 1916, the defendants issued to members of the transferred staff who had not signed the commutation agreement a circular stating that "The Authority will pay income tax on *l.* of your salary less the statutable abatements, allowance in respect of children under 16 years of age, and superannuation deductions." They proposed to pay income tax on the taxable portion of the salary or wages received on March 23, 1911, the date of the commutation circular, and refused to pay income tax payable by reason of (*a*) the receipt of additional salary on promotion, (*b*) the payment of the war bonus, or (*c*) the reduction of the exemption limit, or to pay any income tax in the case of transferred officers and servants who like the plaintiffs had only become assessable since the date of transfer. In actual practice, however, they paid tax on salaries that were over 130*l.* at the date of the circular and had become taxable by the reduction of the exemption limit and also on salaries that had become taxable by automatic rise in the same class.

The London and India Docks Company had issued general regulations for the guidance of the staff, a copy of which was handed to every employee on his appointment.

By regulation 5 every member of the staff is eligible for promotion to any post which his conduct and ability may enable him to fill. Promotions take place as vacancies occur, and are based on merit, with a due regard for seniority. In making the selection the

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By regulation 18 all salaried officers and certain classes of weekly servants may be required to contribute to the superannuation fund, and in that case will be eligible for the benefits set forth in the deed of covenant as to superannuation allowances. If any contributor resigns he receives back half his contributions, but if dismissed he forfeits all claim on the fund.

By regulation 10, except in the case of dismissal, or of any agreement to the contrary, and subject to the superannuation deed, every member of the staff is entitled to notice of the termination of his service as follows:—If in receipt of a salary of 300*l.* or over, three months' notice; if in receipt of a salary of less than 300*l.*, one month's notice; if in receipt of weekly wages, one week's notice. Similar notice will be required from any member of the staff desiring to retire from the service.

By regulation 41 an official circular will be issued, when necessary, to all heads of departments, and must be exhibited in positions easily accessible to every officer and servant. Every member should make himself acquainted with its contents, as it is the authoritative announcement of appointments, promotions, and other matters relating to the staff.

By regulation 42 the directors reserved the right of altering these regulations.

Regulation 43 required the members to keep their books properly written up as alterations were made.

Regulation 44 required the members to read the rules and sign an acknowledgment of having done so.

The evidence showed that the London and India Docks Company, following the practice of their predecessors the London and St. Katharine Docks Company and the East and West India Dock Company, had been in the habit of paying income tax on assessable salaries and wages, but the plaintiffs on entering the service of those predecessors were not aware, and had not accepted their employment on the footing, of any such practice. The same practice had obtained in the Surrey Commercial Dock Company, and, except for a few years prior to April 10, 1908, during which the non-payment was compensated by increase of

salaries, it had obtained in the Millwall Dock Company, and was in force at the date of transfer.

Micklem, K.C., and *H. S. Preston*, for the plaintiffs. General usages are tacitly annexed to all contracts relating to the business with reference to which they are made unless the terms of such contracts expressly or impliedly exclude them: *Metzner* v. *Bolton* (1); *Raitt* v. *Mitchell* (2); *Moult* v. *Halliday* (3); *Reg.* v. *Inhabitants of Stoke-upon-Trent* (4); *Devonald* v. *Rosser & Sons* (5); *Tucker* v. *Linger* (6); *Foxall* v. *International Land Credit Co.* (7); Chitty on Contracts, 16th ed. p. 43.

The fact that the usage was confined to particular dock companies, and that the plaintiffs were in fact unaware of it on entering their employment, is immaterial: *King* v. *Hinde* (8); *Hudson* v. *Ede* (9); *Temple* v. *Runnalls* (10); *Crouch* v. *Crédit Foncier.* (11) It is sufficient that they could have ascertained it by reasonable inquiry: *Plaice* v. *Allcock.* (12) They were aware of the usage before they became assessable, and it was recognized by the defendants' circular of March 23, 1911. The defendants could not alter a usage subject to which they bought the property. The plaintiffs never consented to any alteration.

Hon. Frank Russell, K.C., and *Cecil Turner*, for the defendants. Sect. 60, sub-s. 1 (*b*), only applies to legal obligations. This usage was not a trade usage between a class of traders and their customers. It was a pure bounty from particular masters to their servants. A usage binding the master to pay an absolutely uncertain amount on behalf of his servants would be unreasonable.

Again, the plaintiffs entered their employment without knowledge of the usage. How can it be annexed to their contract of service? *King* v. *Hinde* (8) and *Hudson* v. *Ede* (9) related to the interpretation of the actual terms of a contract, not to the addition of extra terms.

(1) (1854) 9 Ex. 518, 521.
(2) (1815) 4 Camp. 146.
(3) [1898] 1 Q. B. 125.
(4) (1843) 5 Q. B. 303, 307.
(5) [1906] 2 K. B. 728, 733, 741.
(6) (1883) 21 Ch. D. 18; 8 App. Cas. 508.
(7) (1867) 16 L. T. 637.
(8) (1883) 12 L. R. Ir. 113, 120.
(9) (1868) L. R. 3 Q. B. 412, 415.
(10) (1902) 18 Times L. R. 18, 822.
(11) (1873) L. R. 8 Q. B. 374, 386.
(12) (1866) 4 F. & F. 1074.

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In the latter class of cases the usage must be sufficiently universal to come to the knowledge of the servant on entering the employment.

Suppose, however, that there was a usage binding the London and India Docks Company and the defendants. The defendants did their best to put an end to it by their circular of March 23, 1911. With full knowledge of this circular the plaintiffs Meek, Buckley, and Laing accepted promotion to a higher class, and thereby entered into a new contract of service subject to the circular. The same remark applies to the plaintiff Hills, who, though still in the same class, accepted an increase of his maximum salary. The circular no doubt recognized some sort of right in servants then assessable. But this admission was erroneous, and in any case it cannot be relied on as an estoppel.

Micklem, K.C., in reply.

ASTBURY J. (after stating the facts). Subsequently to the date of the circular of March 23, 1911, the plaintiffs Meek, Buckley, and Laing were all promoted to higher classes with a larger salary and different incidents of employment. In my view they were in law offered and accepted a fresh appointment, or a fresh contract of employment, with the knowledge that the defendants had decided as from March 23, 1911, to discontinue the practice of paying the income tax on the salaries and wages of their servants, and on that ground alone I think that their action must necessarily fail.

The plaintiff Hills was at the date of the transfer and at the date of the circular of March, 1911, a first-class foreman in receipt of a weekly wage of 2*l.* 10*s.* He still occupies that position, but on December 1, 1911, after notice of this change of practice in March of the same year, he was given an increase in his wages of 2*s.* a week in excess of the maximum wage that he was entitled to under the regulations in respect of his office or in respect of his class of employment. I am inclined to think that, having regard to the regulations and the scales of pay, this was also a fresh contract of service, and if so, he is in no better position than the other three plaintiffs.

Assuming, however, for the moment that the plaintiff Hills is still employed on the contract of service running at the date of the transfer, then the principal issue intended to be raised by this action has to be decided, namely, whether, as alleged in the state-

ment of claim, it was a term and condition of the employment of every officer and servant employed by the London and India Docks Company at the date of transfer that any income tax assessed or payable in respect of salary or wages should be paid by the dock company; in other words, whether it was a term and condition of the employment of these four plaintiffs that if and when in the future their salaries should amount to a sum liable to income tax that tax should be paid by their employers. If that was a legal incident to and a term of their employment it would fall necessarily within the terms of s. 60.

Now it is quite true that, subject to the temporary exception in the case of the Millwall Dock Company, the defendants' predecessors for some years past, and apparently prior to the employment of the plaintiffs, had been in the habit of paying the income tax on the wages of their servants. But none of the plaintiffs when they entered the employment of those predecessors had ever heard of that practice, and none of them took up their employment with reference thereto. In these circumstances it is difficult to see how it can be held to be an implied term and condition of their service.

In *Reg.* v. *Inhabitants of Stoke-upon-Trent* (1) Lord Denman said: "If the evidence had been admitted, it might have shewn a custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract." That was cited in *Devonald* v. *Rosser & Sons* (2) as correctly stating the law with regard to contracts of service where "custom" or "usage" was raised.

The plaintiffs submitted, and I think accurately, that, assuming this practice to be a general usage within the meaning of the authorities, "such usages are tacitly annexed to all contracts relating to the business with reference to which they are made unless the terms of such contracts expressly or impliedly exclude them." Now there is no evidence as to how long this practice had existed at the date of the plaintiffs' original employment, but it is clear that the practice was either not sufficiently notorious to have reached their knowledge or that they entered into the employment without any reference thereto.

Prima facie a practice by an employer to pay a tax such as income

(1) 5 Q. B. 303, 307. (2) [1906] 2 K. B. 728, 733, 741.

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tax on his servants' salaries ought to be regarded as in the nature of a bounty. It would require a very strong case indeed to turn a practice apparently of bounty into a usage of obligation. This was not a practice relating to the carrying on of a particular trade or business, but it was a method adopted, universally it may be, over a certain period of time by the employer for the purpose of assisting and benefiting his servants.

In the circumstances I do not think the plaintiffs, even if the practice had existed for a long time and was universal, have brought themselves within the authorities which provide that the implication of a term in a contract of this character, and a fortiori a contract affecting the amount of wages, can only be made, and ought only to be made, where the parties seeking the advantage of that implication can be deemed to have entered into the contract of employment on the faith and in consideration of the existence of that usage. There is no ground here for saying that the plaintiffs occupied this position at all, and for these reasons I am not able on the evidence before me to come to the conclusion that this was an obligatory practice or usage binding upon the London and India Docks Company at the date of transfer.

I ought to mention that it is quite obvious that on March 23, 1911, the defendants seemed to be of opinion that servants then in actual receipt of this relief were entitled to it as a condition of their service. The wording of the circular is extremely difficult to understand, but it is perfectly plain that the defendants announced their intention of discontinuing the practice forthwith, and it is equally clear that servants not then in receipt of wages assessable to income tax were not treated as having any right in regard to it under their contract of service. However that may be, the view taken by the defendants in this circular cannot alter the legal position, and I have come to the conclusion that this was not a legal obligation binding on the London and India Docks Company or the defendants in respect of any one of the four plaintiffs.

The plaintiffs therefore fail, and, as the defendants do not ask for costs, the action will be dismissed without costs.

Solicitors : *Blunt & Co.* ; *E. F. Turner & Sons.*

G. R. A.

In re WOOD GREEN AND HORNSEY STEAM LAUNDRY, LIMITED. NEVILLE J. 1918 Jan. 22.

TRENCHARD *v.* SAME.

[1916 W. 541.]

Company—Debenture-holder's Action—Receiver and Manager—Acting as Manager after Date limited by Order—Allowances and Remuneration—Practice—Summons to vary Registrar's Certificate—Further Evidence on Hearing.

It is the duty of a receiver and manager to obey strictly the terms of his appointment and not to act on his own responsibility and then come to the Court to sanction what he has done.

On a summons to vary the registrar's certificate the only evidence admissible is that used before the registrar, and though the Court has power under exceptional circumstances to allow further evidence to be used that power lies with the Court alone and not with the registrar.

THIS was a summons taken out by the liquidator on behalf of the defendant company, now in course of compulsory liquidation, to vary the certificate of the registrar dated June 20, 1917, of allowances on the passing of the accounts of the receiver and manager appointed in a debenture-holder's action. The receiver and manager was appointed on March 16, 1916, with a direction that he was not to act as manager after May 15, 1916, which time was subsequently extended by an order dated July 28, 1916, to September 1, 1916. After that date the receiver, without obtaining any further extension of time, continued to carry on the business of the company admittedly down to October 7, 1916, with a view to selling the property and business as a going concern. The negotiations for this purpose, however, fell through, and on November 7, 1916, the Court made a general order for sale of the property, and further ordered that the receiver should forthwith close down the laundry of the company. Pursuant to an order of January 16, 1917, which was expressly made without prejudice to any question as to the managership of the receiver and amount of his remuneration and expenses, the receiver and manager lodged his first and final account, showing a total balance due to him of 739*l.* 13*s.* 9*d.*

By his certificate dated June 20, 1917, the registrar disallowed

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some small items of disbursement and stated as follows: "Notwithstanding the order of July 28, 1916, the receiver continued to manage without the leave of the Court after September 1, 1916, but I have in my discretion allowed the items of payments in respect thereof." He also stated that having regard to the order dated January 16, 1917, he had forborne to deal with the question of remuneration of the said receiver for the period covered by his said account and of the costs of the passing of his said account, which he directed to stand over to be dealt with by the judge.

The present summons, taken out on July 4, 1917, asked (1.) that the certificate might be varied in respect of the period after September 1, 1916, by disallowing all items except such as would have been allowable if the receiver had been appointed and acted as receiver only, and in respect of the period prior to that date by various other reductions, and (2.) that the company might have leave to adduce further evidence on the hearing of the application to the Court.

On July 12, 1917, a further summons was taken out by the liquidator on behalf of the defendant company before the registrar that directions might be given as to evidence to be filed on the hearing of the summons to vary the certificate. No order was drawn up on this summons, but directions were given by the registrar to file evidence under which affidavits had been filed on both sides.

Two points were taken in argument—(1.) whether items of expenditure and remuneration by way of management after September 1, 1916, ought to be disallowed, and (2.) as to the admissibility of the further evidence.

On the first point:

Jenkins, K.C., and *P. F. S. Stokes*, for the defendant company. The receiver had no right to continue the management of the business after the date fixed by the order of the Court, and the registrar had no discretion to allow any items of payment incurred after that date in respect of management. These items should be disallowed together with any remuneration for management as from September 1, 1916.

Micklem, K.C., and *Warwick Draper*, for the plaintiff. There can be no doubt that if the receiver had come to the Court when the time expired he would under the circumstances have been authorized to continue the management for a further period, and the Court can now sanction what he has done. The point was overlooked at the time. As a matter of fact the laundry was practically shut down on October 7, and the liquidator was aware that the business was being carried on down to that time with a view to the sale of the property and business as a going concern and raised no objection.

NEVILLE J. In my opinion it is of the utmost importance that the orders of the Court should be strictly complied with in these matters and that receivers and managers should not act on their own responsibility and afterwards come to the Court to ratify what they have done. I do not understand what the registrar means when he says that he has allowed these items in the exercise of his discretion, and I am not satisfied with the certificate as it is at present, and I order it to be sent back to the registrar with a direction that he is to disallow all items of expenditure by way of management incurred after the Saturday following the date of the order of November 7, 1916, and I also disallow any remuneration of the receiver as manager from September 1, 1916, when the leave to continue the management of the business expired.

On the second point:

Jenkins, K.C., and *P. F. S. Stokes*, for the defendant company. The evidence before the registrar was insufficient for the determination of the questions which he had to decide, and we ask that the account should be remitted to him for his reconsideration on the evidence now filed. The position of the registrar is not quite the same as that of a Master in the Chancery Division, and there appears to be no rule or express authority as to the practice, but, if the registrar himself had no power, after making his certificate, to give leave to file further evidence on the hearing of a summons to vary it, the Court itself can do so, and the present summons expressly asks for such leave.

Micklem, K.C., and *Warwick Draper*, for the plaintiff, referred

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to Palmer's Company Precedents, 11th ed., pt. iii., p. 689, and Rules of the Supreme Court, 1883, Order LV., r. 70.

NEVILLE J. With regard to the evidence which has been filed since the making of the certificate I feel no doubt about the practice. In my opinion it is the duty of the registrar to be satisfied that he has before him sufficient evidence to enable him to come to a just conclusion on the items of account, and if either party desires to vary the certificate when made he is entitled to use, and use only, the evidence which was before the registrar. There may be occasions when for some reasons or other, which I will not attempt to specify, it may be just that other evidence should be brought before the Court, but that is a question entirely for the Court itself, and the registrar has no power whatever to direct further evidence to be filed for that purpose. In the present case the registrar has made an order giving express liberty to file evidence to be used before the Court on the summons to vary his certificate. That, in my opinion, was a complete misconception. After making his certificate the registrar was functus officio and had no power to give leave to the parties to bring any further evidence before the Court. The fact that he has done so, however, puts me under considerable difficulty, since it amounts to a statement on his part that the evidence before him was not sufficient, and that further evidence should be adduced before I can properly consider the nature of the certificate. That being so, I think that the further evidence must be taken into consideration by the registrar himself, and that the account must go back to be dealt with by him on that evidence which he has, so to speak, invited the parties to put in.

Solicitors: *C. R. Woolley; Hutchison & Cuff.*

A. C.

In re NATIONAL STANDARD LIFE ASSURANCE CORPORATION.

NEVILLE J.
1918
Feb. 12, 19.

[00113 of 1916.]

Life Assurance—Endowment Policy—Right of Executors to surrender on Death of Assured—Repayment of Premiums—Liquidation of Company—Right of Policy-holder to rank against Deposit—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1 (*a*), 30 (*a*).

The company, now in liquidation, in addition to ordinary life assurance business issued endowment policies consisting of assurances of sums of money maturing at the expiration of a stated number of years. Amongst other such policies the company issued a form of certificate whereby in consideration of an annual premium it assured payment to the certificate-holder (which expression included his executors, administrators, and assigns) of a fixed sum at a future date, subject to a condition that the legal personal representatives of any certificate-holder should be at liberty to surrender the certificate to the company within six months of the death of the holder, in which case the company should pay to them the total amount of all premiums then paid thereunder:—

Held, that, looking to the option of surrender given to the legal personal representatives in case of the death of the holder, the form of certificate was a "policy on human life" within the statutory definition contained in s. 30 (*a*) of the Assurance Companies Act, 1909, entitling the holder to resort to the statutory deposit in the liquidation of the company.

THIS corporation was incorporated in 1906, and in addition to ordinary life assurance business carried on a considerable business in endowment assurance, consisting of assurances of sums of money maturing at the expiration of a stated number of years.

Upon the incorporation of the company the deposit of 20,000*l.* required by the Life Assurance Acts, 1870 to 1872, was duly paid into Court in respect of the life assurance business of the company. These Acts were repealed but substantially re-enacted by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), and the arguments proceeded on the footing that for the purposes of this application the position of the deposited fund and the liabilities thereunder

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were the same in respect of policies issued before as on those issued after July 1, 1910, the date of the commencement of that Act. The definitions contained in the Act are set out in the footnote. (1)

The company went into compulsory liquidation in 1916, and this summons was taken out by the liquidator for the determination of the question whether certain so-called endowment assurances were or were not " policies on human life " so as to entitle the holders to rank against the deposit, which by the terms of the Assurance Companies Act, 1909 (re-enacting the provisions of the Acts of 1870 to 1872), is only applicable to the claims of policy-holders in respect of life assurance business. For the purposes of the present summons (as amended) the assurances in question were divided into four classes as follows :—

1. Under the first class the corporation, in consideration of the payment of certain premiums, bound itself to pay a fixed sum to the assured at a fixed date if the assured should be then living, with provisions for the payment of a smaller amount to the legal personal representatives in the event of the death of the assured.

2. Under the second class the corporation bound itself for a like consideration to pay a fixed sum at a fixed date without any reference to the life or death of the assured. The premiums were payable during the whole period, and it was open to the legal personal representatives of the assured to continue to pay the premiums.

(1) The Assurance Companies Act, 1909, s. 1 (*a*), defines " life assurance business " as " the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life : "

Sect. 30 : " Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications :—

" (*a*) ' Policy on human life ' shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life."

3. The third class of assurance was in a form of which the following is a specimen :—

"PURE ENDOWMENT POLICY.

"Policy No. 3320. Endowment payable at the expiration of thirty years if the policy is not previously utilized for loan purposes. Table IX.

"Annual Premium 2*l.* 11 0. 115*l.* With Profits.

Amount of loan obtainable according to conditions herein . . 100*l.*

"This certificate witnesseth that B. A. of . . . . (hereinafter called the 'certificate holder,' which expression shall include the executors administrators and assigns) having paid to the National Standard Life Assurance Corporation, Ld. (hereinafter called the said corporation) the sum of twelve shillings and ninepence as the first instalment of the first annual premium in this certificate for the year commencing August 12, 1908 . . . .

"Now therefore it is hereby agreed subject to and with the benefit of the conditions and privileges endorsed hereon that providing there shall be paid to the said corporation on or before August 12, 1909, and in every succeeding year during the term of this certificate on or before August 12 in each such year the annual premium of 2*l.* 11 0, or if such annual premium is payable by instalments, if such instalments are paid in each year upon the dates set forth for the payment thereof according to the conditions endorsed thereon, then the capital stock estates and securities of the said corporation set aside for that purpose shall be subject and liable to make good and to satisfy unto the certificate holder on August 12, 1938, or so soon after that date as proof satisfactory to the directors of the title of any holder of this certificate (other than the said B. A.) shall be produced, the sum of 100*l.* together with such other amounts as may be determined from time to time by the directors of the said corporation such determination to be accepted as conclusive by the certificate holder (which sums are hereinafter called 'the endowment') and subject to conditions 2 and 10 endorsed hereon a further sum of 15*l.* by way of guaranteed bonus upon this certificate.

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"Conditions and Privileges.

"(2.) At any time after the expiration of five years from the date hereof the certificate holder shall (subject to condition 10 hereof) be entitled to obtain an advance not exceeding the amount of 100*l.* out of the available funds of the said corporation set aside for that purpose for the purchase of house property such house property to be approved by the directors of the said corporation and to be held by them as security for the repayment of the said loan and in accordance with the conditions set forth in the corporation's prospectuses providing that this certificate shall be in force at the date of application for such loan.

"(5.) The legal personal representatives of any certificate holder shall, upon proof of title and providing this certificate shall be in force at the time, be at liberty to surrender this certificate to the corporation within six months of the death of such holder in which case the corporation shall pay to such legal personal representatives the total amount of all premiums then paid hereunder.

"(10.) Provided always that if the within named certificate holder exercises the right conferred upon him by condition 2 hereof the said certificate holder shall be entitled to receive the amount of the endowment only."

4. By the fourth class of assurance the corporation bound itself to pay a fixed sum at a fixed date with a provision that, should the policy-holder die before the date of maturity and while the policy was in force, the policy should become void and the legal personal representatives of the holder should be entitled to the return of all premiums as therein specified: provided that such legal personal representatives might transfer the policy into their own names or to some other person upon giving notice in writing to the corporation within three weeks of the death of the holder of their intention so to do.

Percy Wheeler, for the summons.

A. F. Topham, for the holder of a policy under class 1. The question now depends on the Assurance Companies Act, 1909: *In re National Standard Life Assurance Corporation.* (1) I submit that an assurance falling within class 1 is clearly a "policy on human

(1) [1917] 1 Ch. 193.

life" within all the statutory definitions contained in s. 1 (*a*) and s. 30 (*a*): *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (1); *Joseph* v. *Law Integrity Insurance Co.* (2); *Gould* v. *Curtis.* (3)

Fairfax Luxmoore, for ordinary life policy-holders. I admit that assurances falling within class 1 are "policies on human life" within the statutory definitions. It is equally clear that those falling within class 2 are outside those definitions and are endowment policies in the true sense giving the holders no right to resort to the deposit in respect of life assurance business. There is more difficulty as to policies falling under class 3. On the face of it, and in substance, an assurance of this class is a pure endowment policy if not previously utilized for loan purposes, and the only question is whether the option of surrender given to the assured person's executors by condition 5 has the effect of introducing the contingency of human life. I submit that that condition has no such effect. It is true that the right of the executors to exercise their option cannot arise except by the death of the assured, but the money becomes payable by virtue of the exercise of that option and not on the happening of the death. The statutory definition only applies to cases where the payment is the consequence of death alone without any further requirement. If the executors do not determine the contract by exercising their option the policy continues as an endowment policy pure and simple under which the money remains payable at the fixed date. *Joseph* v. *Law Integrity Insurance Co.* (2) and *Flood* v. *Irish Provident Assurance Co.* (4) do not affect the present point.

Assurances under class 4 are the converse case to those under class 3, the money in the case of class 4 being repayable on the death of the assured unless the executors take steps to continue the policy, and I admit that assurances of this class are "policies on human life" within the statutory definitions.

R. Rowlands, for policy-holders under classes 2, 3 and 4. As to class 2, I admit that these policies are pure endowment policies. Those falling under class 3, however, like those under class 4, are "policies on human life." The effect of condition 5 is to bring the

(1) [1904] 2 K. B. 658.
(2) [1912] 2 Ch. 581.
(3) [1913] 3 K. B. 84.
(4) [1912] 2 Ch. 597, n.

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assurance within the statutory definition in s. 30 (*a*) of a contract by which money is payable on the happening of a "contingency dependent on human life." The contingency which gives rise to the payment of the money is the death of the assured, without which the executors could not exercise any option at all. The difficulty lies not so much in ascertaining the character of the assurance as in making the necessary actuarial valuation. This, however, has no bearing on the question before the Court.

[He was stopped.]

NEVILLE J. In my opinion there is only one class of policy mentioned in the summons which raises any difficulty, and that is the policy falling under the third class, whereby the company assures payment of a sum of money at a fixed date and gives an option to the legal personal representatives to determine the contract on the death of the assured, on the exercise of which option all premiums are to be repaid. A policy falling within the fourth class clearly comes within the statutory definitions, because in that case the money is payable upon the death of the assured unless something intervenes in the shape of a new contract between the legal personal representatives of the assured and the company. Unless that happens the premiums are to be returned on the death of the assured. In the case of policies falling under the third class, however, the premiums are not to be returned to the legal personal representatives unless they choose to determine the contract, which they have power to do. In my opinion Mr. Rowlands was right in contending that the determination of the contract by them is a "contingency dependent on human life" and falls within the statutory definition contained in s. 30 (*a*). The result therefore, in my opinion, is that all the policies, with the exception of those falling under the second class, are "policies on human life" and entitle the holders to rank against the statutory deposit.

Solicitors: *Close & Co.; H. Z. Deane; P. Marr Johnson.*

A. C.

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1918
Jan. 30.

In re HAZELDINE.
PUBLIC TRUSTEE *v.* HAZELDINE.

[1917 H. 1864.]

Will—Construction—Trustees—Power to invest—Unauthorized Investments—Retention—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 1.

A testator devised and bequeathed all his real and personal estate to trustees upon trust to sell, call in, and convert the same into money, and out of the proceeds to pay debts, &c., "and invest the residue of the said moneys with power for my trustees from time to time to vary such investments as they may think fit." The testator directed his trustees to pay the income of his residuary trust funds to his wife for life and then to his daughter for life, and after her death to hold the corpus in trust for her children, and in default, in trust for the testator's wife and brother absolutely.

The testator's estate consisted of freehold hereditaments and a number of investments, some within the provisions of the Trustee Act, 1893, and some unauthorized.

Upon a summons by the Public Trustee to ascertain the powers of the trustees as to investment and the retention of unauthorized investments:—

Held, that, upon the true construction of the will, the words "as they may think fit" applied only to the power to vary investments, and the trustees should confine themselves to investments authorized by law for the investment of trust funds.

Held, further, that in the existing circumstances, the Court would authorize the retention of those which were not trustee investments for the duration of the war, and for six months afterwards, subject to the proviso that the trustees must not neglect any opportunity for disposing of them at a reasonable price. The life tenant would be entitled to interest at 4 per cent. on the value of the unauthorized investments at the death of the testator.

ADJOURNED SUMMONS.

BY his will dated January 14, 1914, William Edward Kendall Hazeldine, after appointing his wife, the defendant Dorothy Hazeldine, and his brother, the defendant Frederick James Hazeldine, his executors, and also appointing the same two persons and the Public Trustee to be the trustees of his will, and making a pecuniary and a specific bequest to his wife, gave, devised, and bequeathed all his real and personal estate whatsoever and wheresoever unto his trustees upon trust that they should sell, call in, and

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convert into money the same, or such parts as should not consist of money, and out of the moneys produced by such sale and conversion pay his debts and funeral and testamentary expenses, and the legacy to his wife, "and invest the residue of the said moneys with power for my trustees from time to time to vary such investments as they may think fit," provided that, should any difference arise between his trustees as to making or varying any investments under his will, F. J. Hazeldine should, during his life, have the sole power of deciding. And the testator directed his trustees to stand possessed of his residuary trust funds in trust to pay the income to his wife for life, and after her death to his daughter, the defendant Frances Dorothy Hazeldine, for her life, and after her death to hold the corpus in trust for all her children in manner therein mentioned, with a provision in the event of her death without leaving issue in the lifetime of her mother that, subject to his wife's interest in the income of the residuary trust funds, his trustees should hold the corpus in trust for his wife and his said brother in equal shares absolutely.

The testator died on July 21, 1916, and the will was duly proved by the executrix and executor.

The testator left his widow and his said daughter surviving him; the daughter was an infant and unmarried.

The estate of the testator amounted to 10,150*l.* 7*s.* 4*d.*, and consisted, inter alia, of certain freehold hereditaments and of various investments, part being authorized within the provisions of the Trustee Act, 1893, and part in a number of small unauthorized securities. All these latter investments were fully paid.

The trustees were desirous of retaining all the unauthorized investments for the present if they had power so to do.

By an originating summons taken out on behalf of the Public Trustee on November 21, 1917, the questions were asked: (1.) Whether, upon the true construction of the will, the trustees were entitled to invest the trust funds in such investments as they might think fit, or whether they were bound to invest only in such investments as were authorized by the Trustee Act, 1893; (2.) in the event of its being decided that they were confined to the Trustee Act, 1893, investments, whether they could retain the freehold hereditaments and the unauthorized investments (set out in the

schedule to the summons) for a period of two years after the declaration of peace in the present war; and (3.) if authorized to retain these investments, whether the rents and dividends payable in respect of the same should be treated as income of authorized investments and applied accordingly.

C. J. W. Farwell, for the plaintiff. On the construction of this will I submit that the words "as they may think fit" apply grammatically to the trust to invest as well as to the power to vary investments. The words mean "honestly think fit," having regard to prudence and the interests of the beneficiaries. In the case of any difference between the trustees the same person has the ultimate decision in both cases: *Stretton* v. *Ashmall* (1); *In re Smith.* (2) In *Bethell* v. *Abraham* (3), however, it was held that the discretion of trustees as to investments would be controlled by the Court. If the words "as they may think fit" do not apply to the trust to invest, the trustees still have a wide discretion to be exercised only with honesty and prudence: *Speight* v. *Gaunt.* (4) They should not be limited to the investments authorized by the Trustee Act, 1893, which is an enabling Act, and does not make it imperative upon the trustees to invest as therein permitted.

Bradley Dyne, for the tenant for life, adopted the same arguments.

H. S. Preston, for the remainderman. The words "as they may think fit" can only apply to the power to vary investments, and is a usual form. I submit that *In re Smith* (2) is not sound law and should not be followed; it is not quoted in any of the text-books. In the present will there is no power to retain investments or to postpone conversion, and the trust to convert is imperative. It is governed by *Bethell* v. *Abraham.* (3) There is no uncontrolled discretion here as there was in *In re Brown.* (5) In that case the trustees had selected certain investments of which the Court would not approve, but as they had acted honestly and there had been no loss to the trust estate the Court held that they ought not to be disallowed the sums so invested.

Before 1859 trustees were strictly bound to invest in Consols:

(1) (1854) 3 Drew. 9.
(2) [1896] 1 Ch. 71.
(3) (1873) L. R. 17 Eq. 24.
(4) (1883) 9 App. Cas. 1, 19.
(5) (1885) 29 Ch. D. 889.

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Prendergast v. *Prendergast* (1); *Thornton* v. *Ellis*. (2) Now, unless expressly forbidden by their trust deed, trustees may invest in the securities authorized by the Trustee Act, 1893, or such other investments as may from time to time be authorized by law.

EVE J., after reading the terms of the bequest and devise in the will and directions as to investments, continued: The first question is whether the words "as they may think fit" qualify the trust to invest as well as the power to vary investments. Mr. Farwell argues that grammatically they do, because the testator goes on to provide, in the words immediately following, that, in case of any difference between his trustees, F. J. Hazeldine's decision is to prevail, not only as to the varying but also as to the making of investments. I do not think that either grammar or context require this construction. The phrase "as they may think fit" has a familiar ring about it in connection with the power to vary, and will, I think, be found in use in many precedents of such a power. I do not think I ought to read the words as extending to the trust to invest in a case where it is quite obvious they may properly be limited to the power to vary. Then arises the question what investments are open to trustees who hold a residue upon trust to invest without any modes of investment being indicated. I do not wish to lay down any rule of too general or wide an application, but where I have to deal with the will of a testator who directs an immediate conversion of everything except money, who gives no power to postpone conversion or to retain investments, and then goes on to create successive life interests in the proceeds of conversion and the investments representing the same, there is, in my opinion, a strong presumption that he contemplated and intended his estate to be laid out in proper trustee securities and investments, and did not intend to clothe his trustees with power to invest in any manner which might seem prudent and right to them. I think there are sufficient indications in this will that the trustees should confine themselves to investments authorized by law for the investment of trust funds, and that is the construction which I put upon it.

It appears that the testator died possessed of a number of investments which are not trustee investments, but which, in the present

(1) (1850) 3 H. L. C. 195. (2) (1852) 15 Beav. 193.

condition of things, are either unrealizable, or, if realizable, can only be sold at what appear to be inadequate prices, and the trustees ask to be allowed to retain these investments until the financial position is more normal. In the circumstances disclosed in the evidence I think I can authorize the retention of these investments for the duration of the war and for six months afterwards, but subject to this proviso, that the trustees must not neglect any opportunity which in the meantime may arise of disposing of them at a reasonable price.

The life tenant will be entitled to interest at 4 per cent. on the value of the unauthorized investments at the death of the testator.

Solicitors: *Hicklin, Washington & Pasmore.*

G. M.

Applied. *Re* GOOD'S WILL TRUSTS. [1950] 2 All E.R. 653.

In re PACKE.

SANDERS *v.* ATTORNEY-GENERAL.

[1917 P. 999.]

Will—Charitable Bequest—Gift for particular Purpose—Particular Purpose impossible—Cy près not applied—Failure of Charitable Bequest.

A testatrix gave to the Poor Clergy Relief Corporation her freehold cottage known as The Retreat and the sum of 1100*l.* "upon trust to use the said premises as a holiday home or house of rest for clergymen of the Church of England and their wives and to invest the sum of one thousand one hundred pounds and apply the income thereof in or towards the carrying on of the said premises as a holiday home or house of rest aforesaid provided that should the said corporation decline the devise and bequest of my cottage The Retreat I revoke the legacy of one thousand one hundred pounds to the said corporation and I give devise and bequeath the said premises known as The Retreat and the sum of one thousand one hundred pounds to my executors and trustees to convey and make over the same to any other society which my executors and trustees may in their discretion select upon trust to use the said premises as a holiday home or house of rest for ladies or gentlemen of limited means whom it may benefit."

The corporation renounced the devise and bequest of the cottage

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and sum of money, and the executors were unable to find any other society willing to undertake the trust, the reason being the distance of the cottage from a railway station and the insufficiency of the fund to carry on the premises as directed by the testatrix :—

Held, that as the particular charitable purpose for which the bequest was made was impracticable, and no paramount general charitable intention was implied by the will, the charitable bequest failed.

ADJOURNED SUMMONS.

Georgina T. Packe, by her will dated October 20, 1905, appointed the plaintiffs and another person (who predeceased her) the executors and trustees of her will and, after certain specific devises and bequests, made the following bequest :—

"I give devise and bequeath to the Poor Clergy Relief Corporation whose office is situate at 38 Tavistock Street London my freehold cottage and premises known as The Retreat in the parish of Strete aforesaid and also the sum of one thousand one hundred pounds upon trust to use the premises as a holiday home or house of rest for clergymen of the Church of England and their wives and to invest the sum of one thousand one hundred pounds and apply the income thereof in or toward the carrying on of the said premises as a holiday house or home of rest aforesaid provided that should the said corporation decline the devise and bequest of my cottage The Retreat I revoke the legacy of one thousand one hundred pounds to the said corporation and I give devise and bequeath the said premises known as The Retreat and the sum of one thousand one hundred pounds to my executors and trustees upon trust to convey and make over the same to any other society which my executors and trustees may in their discretion select upon trust to use the said premises as a holiday home or house of rest for ladies or gentlemen of limited means whom it may benefit." The will contained a general residuary clause.

In 1912 the testatrix made a codicil to her will, whereby, after reciting the above bequest to the Poor Clergy Relief Corporation, she declared it to be her wish "if the said corporation shall accept the devise and bequest contained in my said will but without making it obligatory upon the corporation so to do that the corporation shall give preference to clergymen of the Church of England and their wives from the Southwark Diocese to use the said home during

the summer months and at other periods clergymen and their wives from the Exeter Diocese."

The testatrix died in 1916.

The premises known as The Retreat consisted of a small house of considerable age lying at the back of cottages which formed the front of a street passing through the village of Strete, in Devonshire. It contained two sitting-rooms and five bedrooms, and was valued for estate duty at 220*l.*

The Poor Clergy Relief Corporation by a letter from their secretary dated December 5, 1916, renounced the said devise and bequest to them of The Retreat and the sum of 1100*l.*, and thereupon the said premises and the sum of 1100*l.* became vested in the plaintiffs upon trust to convey and make over the same to some other society which they in their discretion might select. The plaintiffs accordingly successively selected the National Benevolent Institution and the Clergy Help Society, of Exeter, but both these societies after careful consideration declined to accept the trust, and the plaintiffs were unable to hear of any similar society which would undertake the trust. They therefore issued a summons (1.) to obtain directions as to what further steps (if any) they should take for the purpose of carrying out the intentions of the testatrix with respect to the said premises and the said sum of 1100*l.*; (2.) to determine upon what trusts and for whom the plaintiffs ought to hold the said premises and the said sum of 1100*l.*, and (3.) that if necessary a scheme might be established in the event of it being declared that the plaintiffs held the said premises and the said sum of 1100*l.* upon trusts for charitable purposes notwithstanding that the expressed intentions of the testatrix could not be carried out as declared in the said will.

The plaintiffs in their affidavit deposed that notwithstanding the inquiries hitherto made by them they had been unable, and did not think it likely that they would be able, to find any society which would undertake the trusts of the said premises and sum of money. The house was likely to be used for the purposes intended only during the summer months. A caretaker throughout the year would probably be a necessity, and the expense of a caretaker and the cost of the upkeep of house and furniture would more than swallow up the interest on 1100*l.* This and the distance of five

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miles from the nearest railway station, Dartmouth, were in their opinion the reasons why the societies approached had declined to undertake the trust.

J. S. Franey (for *F. H. Errington*, serving with His Majesty's Forces), for the plaintiffs.

Austen-Cartmell, for the Attorney-General. The case falls within the principle that, if strict compliance with the directions of the author of the trust should turn out to be impracticable, the Court will on the doctrine of cy près direct a scheme: *Chamberlayne* v. *Brockett* (1); *Biscoe* v. *Jackson*. (2) Here there is a paramount general charitable intention. There is a mere failure of the charitable machinery for the trust; and the absence of a society willing to accept the trust and the insufficiency of the fund for the exact purpose of the testatrix are immaterial and do not cause a failure of the charity. The Court can apply the principle of cy près and direct a scheme under which the cottage could be sold and the proceeds with the 1100*l.* could be paid over to some charitable institution to be applied for the benefit of ladies and gentlemen of limited means, which is a most beneficent object and would be a great boon for such persons. It is admitted that the trustees have done what they could in the matter, and that the charitable bequest cannot with advantage be carried out modo et forma as desired by the testatrix.

G. T. Simonds, for the residuary legatee. It is submitted that the gift being for a particular charitable purpose which is impracticable, the gift fails and the property passes under the residuary bequest. The principle of cy près can only be applied if there is a general charitable intention. Here it is obvious that what the testatrix intended was that the house itself should be used and carried on for a particular purpose either as a holiday resort for particular clergy and their wives or for persons of limited means. The house cannot be used for the particular purpose, and there is no implied general charitable intention. She looks at the mode rather than the class of objects who are to take. It is impossible to carry out the particular purpose, and therefore the gift is within the principle of

(1) (1872) L. R. 8 Ch. 206, 211. (2) (1887) 35 Ch. D. 460.

In re Wilson (1) and fails. Other instances of the failure of a charitable bequest are *Cherry* v. *Mott* (2), *Corbyn* v. *French* (3), *In re White's Trusts* (4), *In re University of London Medical Sciences Institute Fund* (5), and *Attorney-General* v. *Bishop of Oxford.* (6) In *Chamberlayne* v. *Brockett* (7) there was a general charitable intention.

Austen-Cartmell in reply on the cases cited. The principle is stated and the authorities are collected in Tudor's Charitable Trusts, 4th ed. pp. 101, 105.

G. T. Simonds. That edition of Tudor's Charitable Trusts was published before *In re Wilson* (1) was decided.

NEVILLE J. The testatrix by her will gave to the Poor Clergy Relief Corporation a cottage known as "The Retreat" and also a sum of 1100*l.* upon trust to use the premises as a holiday home or house of rest for clergymen of the Church of England and their wives, and to invest the sum of 1100*l.* towards carrying on the premises as a holiday home or house of rest; and then, in case the corporation declined the gift, the testatrix devised and bequeathed the premises and the sum of 1100*l.* to her executors "upon trust to convey and make over the same to any other society which my executors and trustees may in their discretion select upon trust to use the premises as a holiday home or house of rest for ladies and gentlemen of limited means whom it may benefit."

The Poor Clergy Relief Corporation have declined the gift and no other society has been discovered which will accept it with a view to carrying out the intentions expressed by the testatrix. It is not seriously contended that it could be carried on as a private trust, inasmuch as the income provided for the purpose of carrying on a home of rest is obviously inadequate. I have therefore to consider whether, notwithstanding that failure of the testatrix's intention as expressed with regard to the house mentioned in her will, there is such a general charitable intention as to make it right that the Court should direct a scheme to be prepared by which the property can

(1) [1913] 1 Ch. 314, 321.
(2) (1836) 1 My. & Cr. 123.
(3) (1799) 4 Ves. 418, 427.
(4) (1886) 33 Ch. D. 449.
(5) [1909] 2 Ch. 1, 9.
(6) (1786) 1 Bro. C. C. 444, n.
(7) L. R. 8 Ch. 206.

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be realized and the funds distributed for some charitable purpose. I cannot put the question I have to decide better than it is put by Parker J. in the case of *In re Wilson* (1), where he says: "First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. . . . . Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift, -a gift for a particular purpose -and it being impossible to carry out that particular purpose, the whole gift is held to fail." I can only say that, after studying this will with care, I cannot find on the part of the testatrix any hint of any general charitable intention. So far as anything is disclosed by the will, one cannot say whether she had any intention of any sort beyond the intention that the particular charitable purpose which she expressed should be carried into effect. It seems to me, therefore, to be playing with words in the case of a will of this kind to pretend to find a general charitable intention paramount to the particular directions given with regard to the house. A question of this kind must of course always be to a very large extent a question of authority. The cases are numerous, and there are lines of decisions which ought not to be departed from; but they do not appear to me to affect this case. It seems to me, so far as assistance can be derived from the authorities cited, that this case is more like *Attorney-General* v. *Bishop of Oxford* (2) than any of the others. In that case money was left to build a church at A. That proved impossible, and it was suggested that the money could still be applied for some other purpose, such as building a church at B., and it was held, as far as that will was concerned, no such application of the doctrine of cy près was permissible. I think, therefore, that in the present

(1) [1913] 1 Ch. 314, 320. (2) 1 Bro. C. C. 444, n.

case the particular charitable bequest fails, and the property falls into the residue.

Solicitors: *W. R. Sanders; Patersons, Snow & Co.; The Treasury Solicitor.*

H. L. F.

DOBB *v.* HENRY DOBB, LIMITED.

[1916 D. 155]

Emergency Legislation—Practice—Taxed Costs—Leave to issue Execution —"Sum of money"—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*a*)—*Courts (Emergency Powers) Order*, 1914—*Courts (Emergency Powers) Act*, 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 6.

By the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1, "From and after the passing of this Act no person shall—(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this section applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act. . . . . This sub-section shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August nineteen hundred and fourteen":—

Held, that the section must be read and construed as extending to any judgment or order for the payment of any sum whatever, not excluded from its operation by the terms of the Act itself, or some subsequent statute or Order in Council.

Held, therefore, that the section extended to an order for payment of taxed costs by the plaintiffs on dismissal of an action for breach of contract, and that leave to proceed to execution was therefore necessary.

ORIGINAL MOTION.

This was an application by the defendant Henry Dobb by way of original motion under the Courts (Emergency Powers) Acts, 1914 to 1917, for leave of the Court of Appeal to proceed to execution or otherwise to the enforcement of an order of the Court of Appeal dated October 25, 1917, and that it might be referred to the Master for him to inquire into the facts and to report to the Court of Appeal thereon.

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The action was brought by the plaintiffs against the defendants Henry Dobb and Emily Dobb for breach of an alleged agreement entered into before August 4, 1914, and against the defendant company for wrongful dismissal.

By the order of the Court of Appeal of October 25, 1917, the action was dismissed as against the defendant Henry Dobb, and it was referred to the taxing Master to tax the defendants' costs of the action and of the appeal (subject to the exception and set-off therein mentioned), and the plaintiffs were ordered to pay to the defendant the amount certified by the taxing Master.

These costs had now been taxed and certified at the sum of 432*l.* 7*s.* 10*d.*

Theobald Mathew, for the defendant Henry Dobb, in support of the motion. Sect. 1, sub-s. 1 (*a*), of the Courts (Emergency Powers) Act, 1914 (1), covers the case of a sum of money ordered to be paid in respect of taxed costs. It is a sum of money ordered to be paid under an order of the Court in an action which is not an action of tort. Leave to proceed to execution is therefore necessary.

[He was stopped.]

Henry Johnston, for the plaintiffs. The present application is misconceived. Although the Act of 1914 is intituled "An Act to give, in connexion with the present War, further powers to Courts in relation to the remedies for the recovery of money, and in relation to other similar matters," some limit must be placed on the Act. The Act must be considered as it was passed, and not by the light either of subsequent legislation or subsequent Orders in Council. It is submitted that the Act only applies to the recovery of money under pre-war contracts. All judgments are for some purposes contracts of record, but, having regard to the decision in *O'Flaherty* v. *Gethings* (2), it is not contended that all judgments are contracts within the meaning of this Act. That being so, it is submitted that the Act is open to three possible constructions—(*a*) that it applies only to rents under 50*l.* and the recovery of small tenements; (*b*) that it applies to everything except post-war contracts; (*c*) that it applies to pre-war contracts only.

Although sub-s. 1 contains almost an express provision by way

(1) See note on p. 450, post. (2) [1916] 1 I. R. 265.

of double negative that the Act shall apply to small rents and sub-s. 4 expressly provides that it shall apply to the recovery of small tenements, it is hardly conceivable that this can be the true meaning of the Legislature. Knowing the circumstances existing and the mischief intended to be remedied, one can say without hesitation that this construction is too narrow if there is any other.

It is now suggested that the Act applies to everything except post-war contracts. This gives no real effect to the words "to which this section applies" in sub-s. 1 (*a*) of s. 1, which are meant to impose some limitation. This construction is unreasonably wide. Consider the extraordinary intention it imputes to the Legislature. A person who makes a post-war mortgage, but owing to the war is unable to redeem it, has no redress; execution may issue, the security may be enforced, and he may be made bankrupt; whereas a person who since the war is ordered to pay damages for fraud, deceit, libel or slander, or mulcted in damages in a divorce suit, or a person against whom an affiliation order is made, is given an opportunity of having execution postponed, &c. It is submitted that that is an unreasonable intention to impute to the Legislature. One can understand the Legislature saying that no payment of money whatsoever, and no security, shall be enforced without leave, but cannot understand the provision that whereas there is no relief for mere breach of contract there is relief for the wrong-doer, including the adulterer or father of an illegitimate child. If there is any reasonable construction which avoids this result and puts a reasonable interpretation on the Act it should be adopted.

The question is what is the inference to be drawn from the exception of post-war contracts? It is submitted it is not that the Act applies to all moneys, but that it applies to money under pre-war contracts. This remedies what may be assumed to be the mischief intended to be remedied and places a reasonable interpretation on the Act which is neither too narrow nor too wide. Sect. 1 (*a*) of the Courts (Emergency Powers) Act, 1916 (6 & 7 Geo. 5, c. 13), intended to give soldiers full relief under the Act of 1914, not to give relief in respect of contracts whilst giving no relief in respect of other moneys.

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The Order in Council of September 17, 1914 (1), as to fines, &c., issued three weeks after the passing of the Act, was issued to quiet difficulties which one may assume had arisen in magistrates' Courts all over the country.

The decisions on the Acts are conflicting. Before the Act of 1917 was passed some doubt existed as to whether the Act of 1914 applied to actions of tort. Lush J. at chambers in *Midland Furnishing Co.* v. *Allan Tracy & Co.* (2) held that it did not. Low J. at chambers in *Salisbury* v. *Metropolitan Electric Tramways Co.* (3) held that it did. In *Evans* v. *Main Colliery Co.* (4) the Court of Appeal acted on the assumption that the Act applied to cases of tort. In *In re The World of Golf, Ld.* (5) Neville J., and in *Torres* v. *Torres* (6) Eve J., held that the Act did not apply to a judgment or order for costs only, but in *Salisbury* v. *Metropolitan Electric Tramways Co.* (3) Low J. held that it did. It is submitted that the decisions in *In re The World of Golf, Ld.* (5) and *Torres* v. *Torres* (6) are correct and should be approved by this Court. [He also referred to *In re A Company.* (7)]

Theobald Mathew in reply. The decisions under the Courts (Emergency Powers) Act, 1914, are not easy to reconcile, but the terms of the statute itself are clear enough. The title of the Act shows that it was intended to apply to all " remedies for the recovery of money," and s. 1, sub-s. 1 (*a*), refers to " any judgment or order " for " the payment or recovery of a sum of money." An order for the payment of taxed costs comes within those words. By s. 1, sub-s. 1, post-war contracts and a particular class of life and endowment policies are excluded from the operation of the Act, but nothing else. The Order in Council of September 17, 1914, would not have been necessary if s. 1, sub-s. 1, did not apply to fines, sums due under a recognizance, and affiliation orders; and s. 6 of the Act of 1917 would not have excluded judgments and orders for costs in actions of tort unless they were covered by the Act of 1914. And the exclusion in terms of such judgments and orders for costs indicates the intention of the Legislature to leave unaffected

(1) See note on p. 451, post. [1915] W. N. 10.
(2) July 31, 1916. Unreported.
(3) June 12, 1917. Unreported.
(4) (1914) 31 Times L. R. 127; (1914) 59 Sol. J. 7.
(5) (1914) 59 Sol. J. 7.
(6) [1917] W. N. 263.
(7) [1915] 1 Ch. 520, 529.

pre-war contracts and costs recovered in actions relating to them.

Cur. adv. vult.

March 26. The following judgments were read :—

SWINFEN EADY L.J. By an order of this Court made on October 25, 1917, it was ordered that the action be dismissed as against the defendant Henry Dobb, and the plaintiffs were ordered to pay to the defendant Henry Dobb the amount of certain costs to be taxed. The taxation has been completed and the amount due to the defendant Henry Dobb has been certified to be 432*l.* 7*s.* 10*d.* The defendant Henry Dobb now applies under the Courts (Emergency Powers) Acts, 1914 to 1917, for leave to proceed to execution or otherwise to the enforcement of the said order of October 25, 1917, and that it may be referred to the Master for him to inquire into the facts and report to the Court of Appeal thereon. The plaintiffs oppose the application on the ground that it is unnecessary ; and they contend that as the order of October 25, 1917, is only for the payment of costs there is nothing in the Act to prevent the defendant issuing the ordinary process of execution without leave.

The question so raised is of considerable importance, and affects the daily practice. Different opinions on the construction of the statute have been given by different judges, and, as there are conflicting decisions upon it, it is expedient that this Court should decide its construction and effect.

The Courts (Emergency Powers) Act, 1914, is intituled "An Act to give, in connexion with the present War, further powers to Courts in relation to the remedies for the recovery of money, and in relation to other similar matters." The effect of s. 1, sub-s. 1 (*a*), is that from and after the passing of the Act on August 31, 1914, no person can proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court for the payment or recovery of a sum of money to which the sub-section applies, without the leave of the Court. The difficulty is to determine what is "a sum of money to which this sub-section applies." The Act does not contain any provision which in terms defines it ; it proceeds to exclude certain moneys from the Act,

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leaving it to be inferred that what is not excluded must be deemed to be included. Sums of money due and payable under post-war contracts are excluded from its operation, unless the contracts are for the payment of rent less than 50*l.* a year, when it is obviously intended that they shall be included, although not so provided in express terms. It is then provided that sub-s. 1 applies to certain life or endowment policies, thus impliedly excluding all other life or endowment policies. A sum of money payable by or recoverable from the subject of a Sovereign or State at war with His Majesty is excluded (s. 1, sub-s. 7).

It is urged that the Act ought to be limited to moneys payable under some contract, but I see no ground for so limiting it. This would be merely guessing at what the Legislature intended. By s. 2, sub-s. 4, His Majesty may, by Order in Council, provide that the Act shall have effect subject to such limitations as may be contained in the Order. Thus the operation of the Act may be limited from time to time, and as often as it may be thought expedient to exclude any sums of money from its operation. It has been limited, both by a subsequent Order in Council and by statute. An Order in Council of September 17, 1914, which may be cited as "the Courts (Emergency Powers) Order, 1914," introduced a further limitation to sub-s. 1 of s. 1 by providing that the same should not apply to proceedings for the levying of any fine, or for the enforcement of any sum due under a recognizance, or for the enforcement of any order of affiliation, or any order enforceable in the same manner as an order of affiliation. By the Courts (Emergency Powers) Act, 1917, it is provided by s. 6 that s. 1, sub-s. 1 (*a*), of the Act of 1914 shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort.

The scheme of the Act of 1914 was, in my opinion, to embrace within it all judgments or orders for any sum of money, unless excluded, and then to leave it to His Majesty in Council to exclude from time to time whatever might be thought necessary or proper. It must be remembered that the statute was intended to alleviate the position of persons who were unable to make the payment due from them by reason of circumstances attributable directly or indirectly to the present war, and a liberal and beneficial construc-

tion should be given to it. See *Heydon's Case* (1), where it was laid down that "the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy"; see also *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (2), Lord Halsbury's observations on the canons of construction recorded in *Heydon's Case.* (1) In my opinion the Act should be read and construed as extending to any judgment or order for the payment of any sum whatever, unless such sum be excluded from its operation by the terms of the Act itself, or some subsequent statute or Order in Council. It will thus extend to the costs, the subject of this application, and leave to proceed to execution is necessary.

BANKES L.J. This is an application for leave to proceed to execution for the enforcement of an order of this Court for costs. The form of the application is that the matter should be referred to the Master to report. Nothing turns on the form of the application. The objection taken is that the Courts (Emergency Powers) Act, 1914, has no application to an order for costs, and that the application is therefore unnecessary and ought to be dismissed. The Act in question was passed on August 31, 1914, at a time of great stress. It forms part of a great body of emergency legislation. The framers of the Act obviously realized that it had been framed in language more comprehensive than experience might prove to have been desirable. The last sub-section of s. 2 contains the unusual provision that His Majesty may by Order in Council at any time provide that the Act shall have effect subject to such limitations as may be contained in the Order. This power was exercised by the Order in Council of September, 17, 1914, in reference to fines, and the enforcement of the payment of sums due under a recognizance, and of any order of affiliation. Our attention was directed to several decisions by judges of first instance, some of them conflicting, in which a limited construction had been placed upon the very general language of the Act. I can find nothing in the language of the section which appears to me to afford a safe guide as to the limitation which should be adopted. Under these circumstances I think that effect must be given to the actual

(1) (1584) 3 Rep. 7a, 7b. (2) [1898] A. C. 571, 573.

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language used, even though the result may be to include cases which very possibly were not within the contemplation of the framers of the Act. Any limitation upon the operation of the statute which experience has shown to be necessary should be effected by further legislation, or by an Order in Council, rather than by judicial interpretation which has no sure guide to direct it.

In my opinion an order directing the payment of costs does come within the very wide language of s. 1, sub-s. 1 (*a*), and does not come within the exception to that sub-section. Under these circumstances the application was properly made and must be allowed.

EVE J. This application raises the much-debated question, To what sums of money does sub-s. 1 of s. 1 of the Courts (Emergency Powers) Act, 1914, apply ? The question is one upon which there has hitherto existed a considerable divergence of opinion, as appears from the conflicting decisions of judges of first instance. The practical difficulties of the wider construction have no doubt been mitigated by the Order in Council and s. 6 of the Act of 1917, to which my Lords have already called attention, but the point still remains an important one.

It is, however, mainly a question of practice, and, as it is of great advantage that uniformity and unanimity should prevail in such matters, I do not dissent from the conclusion arrived at in the judgments just delivered.

Solicitors : *Theodore Goddard & Co. ; Lovell & White.*

Note.

Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 : " From and after the passing of this Act no person shall—

" (*a*) proceed to execution on, or otherwise to the enforcement of any judgment or order of any Court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this subsection applies, except after such application to such Court and such notice as may be provided for by rules or directions under this Act ; or

" (*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of

enforcing the payment, or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act.

"This subsection shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August nineteen hundred and fourteen.

"This subsection applies to life or endowment policies for an amount not exceeding twenty-five pounds, or payments equivalent thereto, the premiums in respect of which are payable at not longer than monthly intervals, and have been paid for at least the two years preceding the fourth day of August nineteen hundred and fourteen."

. . . . . .

Sub-s. 4: "This Act shall apply to all proceedings for the recovery of possession of tenements under the Small Tenements Recovery Act, 1838, as if they were in all cases proceedings for the payment or recovery of a sum of money due and payable on account of rent."

. . . . . .

Sub-s. 7: "Nothing in this Act shall . . . . give any power to stay execution or defer the operation of any remedies of a creditor in the case of a sum of money payable by, or recoverable from, the subject of a Sovereign or State at war with His Majesty."

. . . . . .

Sect. 2, sub-s. 4: "His Majesty may, by Order in Council, at any time determine the operation of this Act, or provide that this Act shall have effect subject to such limitations as may be contained in the Order; but, subject to the operation of any such Order in Council, this Act shall have effect during the continuance of the present war, and for a period of six months thereafter."

Order in Council dated September 17, 1914: "1. The Courts (Emergency Powers) Act, 1914, shall have effect subject to the following limitation, that is to say, that sub-section (1.) of section 1 thereof shall not apply in the case of any proceedings for the levying of any fine, or for the enforcement of the payment of any sum due under a recognizance, or for the enforcement of any order of affiliation or any order enforceable in the same manner as an order of affiliation.

"2. This Order may be cited as the Courts (Emergency Powers) Order, 1914."

Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), s. 6: "The provisions of section one, subsection (1.) (*a*) of the Courts (Emergency Powers) Act, 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort, or in Scotland in any action of reparation founded on delinquency, whether before or after the commencement of this Act."

W. I. C.

NEVILLE J.

1918

Feb. 15.

In re BARROW'S POLICY TRUSTS.

[1900 B. 2210.]

Life Assurance—Trust Policy—Reversionary Interest—Mortgage—Fund in Court—Payment out—Married Woman—Married Women's Reversionary Interest Act (*Malins' Act*), 1857 (20 & 21 *Vict. c.* 57), *s.* 1.

In 1887 a sum of India stock representing the proceeds of a policy on a life that had dropped was held in trust for A., the widow of the assured, for life and after her death for his three children by her, one of whom was a daughter who had married before the Married Women's Property Act, 1882, came into operation.

In 1890 A. as to her life interest, and the daughter and one of the sons as to their respective reversions in one third of the trust funds, mortgaged the same for 400*l.*, and the daughter, who did not acknowledge the mortgage under Malins' Act, received one third of the money. Her husband was no party to this transaction and subsequently died.

In 1893 the trustee, at the request of all the beneficiaries and on a covenant of indemnity from the two sons, paid off the mortgage out of the trust funds; and after his death, and on the appointment of a new trustee, the balance of the India stock was under an order transferred into Court.

A. died in 1917, and on a petition by the daughter for payment out of the fund in Court she claimed that the mortgage did not bind her or operate to charge her share in the trust funds, and that, as between herself and her brothers, she was entitled to be paid out of the fund in Court an amount equal to one third of the original trust funds:—

Held, that the fund in Court was divisible into equal thirds, for that the Court was not administering the trust estate and that the petitioner, whatever her claim might be against the deceased trustee's estate, had no personal right or claim against the other cestuis que trust.

PETITION.

In September, 1872, Francis Barrow effected a policy on his own life for 2000*l.* with an assurance company for the benefit of his wife, Agnes, for life, and after her death for his three named children, Ada, Albert, and Cecil, pursuant to s. 10 of the Married Women's Property Act, 1870; and by an order of the Court made on December 20, 1872, Henry Barrow was appointed the trustee of the policy.

In December, 1882, Ada Barrow married W. Henderson. No settlement was made at the time of or subsequent to this marriage

which in any way affected her share or interest in the said policy moneys. In 1887 Francis Barrow died, and the proceeds of the policy were paid to Henry Barrow, and were by him invested in 2221*l.* 2*s.* 8*d.* India 3½ per cent. stock.

By a deed dated October 16, 1890, and made between Agnes Barrow of the first part, Albert Barrow of the second part, Ada Henderson of the third part, and A. Stallard of the fourth part, after reciting (inter alia) that Agnes Barrow, Albert Barrow, and Ada Henderson had requested Arthur Stallard to lend them 400*l.*, which he had agreed to do upon having the repayment thereof with interest secured in manner thereinafter expressed, it was witnessed that in consideration of 400*l.* paid by A. Stallard to Agnes Barrow, Albert Barrow, and Ada Henderson, the receipt of which they respectively acknowledged, Agnes Barrow as beneficial owner conveyed to A. Stallard her life interest in the said sum of India stock and in the investments for the time being representing the same subject to redemption, and Albert Barrow as beneficial owner conveyed to A. Stallard his equal one-third share expectant on the decease of Agnes Barrow in the said sum of India stock and the investments representing the same subject to redemption, and Ada Henderson as beneficial owner, "if and so far as she had power to do so," conveyed her equal one-third share expectant on the decease of Agnes Barrow in the said sum of India stock and the investments for the time being representing the same to A. Stallard subject to redemption. The 400*l.* was applied, firstly, in paying the costs of the mortgage, and, of the balance, one third was paid to Ada Henderson (who was living apart from her husband), another third was paid to Albert Barrow, and the remaining third was paid to Agnes Barrow for the benefit of Cecil Barrow, who was then an infant.

By a deed dated March 22, 1893, and made between Albert Barrow and Cecil Barrow of the one part and Henry Barrow of the other part, after reciting (inter alia) that Agnes Barrow, Albert Barrow, Ada Henderson, and Cecil Barrow had requested Henry Barrow to pay A. Stallard the principal, interest, and costs due under the mortgage, and the costs, charges, and expenses attending the preparation and execution of the now stated deed, and for that purpose to sell a sufficient part of the said sum of 2221*l.* 2*s.* 8*d.* India stock, and "(inasmuch as the said Ada Henderson is a married

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woman living apart from her husband and is not entitled to her share of the said trust fund for her separate use)" it had been agreed that if Henry Barrow would comply with such request, Albert Barrow and Cecil Barrow would execute the indemnity and charge thereinafter contained, and reciting that Henry Barrow was about to comply with such request, it was witnessed that, in pursuance of the agreement and in consideration of the premises, Albert Barrow and Cecil Barrow covenanted with Henry Barrow that they respectively, and their respective heirs, executors and administrators, would at all times thereafter keep indemnified Henry Barrow, his heirs, executors, administrators, estate, and effects, against all actions, proceedings, costs, claims, and demands by reason of his selling a part of the said India stock sufficient to pay the principal, interest, and costs thereinbefore mentioned. And it was further witnessed that each of them, Albert Barrow and Cecil Barrow, thereby charged his share expectant on the death of Agnes Barrow in the said India stock and the investments for the time being representing the same, with payment to Henry Barrow, his heirs, executors, and administrators, of all sums of money, if any, which he or they might pay in respect of the actions, proceedings, costs, claims, and demands to which the covenant thereinbefore contained related.

Pursuant to this deed Henry Barrow sold part of the India stock and paid off the mortgage and costs above mentioned, and A. Stallard reconveyed the mortgaged premises by a deed in common form.

Henry Barrow died in 1897.

By an order made on October 1, 1899, on an application under the Trustee Act, 1893, by the beneficiaries, H. Hudson was appointed a trustee of the said policy moneys, and it was ordered that H. Hudson should transfer and lodge in Court the sum of 1814*l.* 10*s.* 1*d.* India 3½ per cent. stock (which then represented the said policy moneys) to the credit of "*In re Barrow's Policy Trusts.* 1900 B. 2210."

In 1907 W. Henderson died. He was no party to the mortgage transactions above stated.

Agnes Barrow died in 1917.

Ada Henderson now presented a petition for payment out of the fund in Court, and submitted that, having regard to the fact that at the date of the mortgage of October 16, 1890, and at the time of the

request to Henry Barrow to pay off the same out of the policy moneys she was a married woman and had married prior to January, 1883, the mortgage was not binding upon her and could not operate to charge her share and interest in the policy moneys, and that accordingly as between her and Albert Barrow and Cecil Barrow and their assignees she was entitled to have the fund in Court distributed on the footing that no part of the proceeds of the India stock applied in payment of the mortgage could be deducted from her original third share of the policy moneys and the investments representing the same.

C. Farwell, for Ada Henderson. The petitioner could not deal with her reversionary share in the trust funds except under Malins' Act. There was no fraud, no concealment of any kind. She was living apart from her husband, and in the mortgage she conveys "if and so far as she had power to do so." She was no party to the indemnity deed, and the recitals in it show the position. It is clear on the authorities that the mortgage did not bind her in law nor operate as a charge on her one third of the trust funds. If the mortgage were now still on foot, the position would be the same and she would get her full one third free from the mortgage. The true view is there was no breach of trust in paying off the mortgage. It was really Albert's mortgage, and he permitted her to have part of the money. It was a voluntary payment by him or by his direction. The mortgage must be taken to have been paid off out of the shares of the two brothers with the consent of the mother. As between Ada and her two brothers she is entitled to have her full one-third share made good to her out of the fund in Court: *Phillipson* v. *Gatty*. (1)

[NEVILLE J. referred to s. 45 of the Trustee Act, 1893.]

It is submitted that that section does not apply to a reversionary interest in a case like this. The Court has not to consider a breach of trust here because Ada never received any part of the trust funds but only part of the money raised by Albert. If paying off the mortgage out of the trust fund was a breach of trust, it is admitted that any action against the trustee, Henry Barrow, is statute-barred except in the case of a reversionary interest, and I ask that the petition may

(1) (1850) 2 H. & T. 459, 461.

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stand over in order that an action may be brought against him to replace the money improperly paid away.

H. S. Preston, for Albert and his assignees, and *C. S. Crossman*, for Cecil and his assignees, and also for the legal personal representatives of Hudson, were not called upon.

NEVILLE J. The question raised upon this petition is one of some importance, and depends upon the proper inference to be drawn from the transactions which are stated. The petition is for payment out of a sum of 1765*l.* 16*s.* 5*d.* India 3½ per cent. stock which now represents the balance of a sum that was paid into Court, and was part of the proceeds of a policy effected by a gentleman and settled upon his wife for life with remainder to their three children. The sum was paid into Court by a trustee who had been appointed by the Court. The original sum was something over 2000*l.* Some of the cestuis que trust raised a sum of 400*l.* upon their interests. One of them was a married woman and, whether it was a reversion or whether upon the consent and concurrence of the tenant for life it became an interest in possession, in neither case was she able to make a title to her share of the fund. Subsequently, at the request of the beneficiaries, the trustee paid off the 400*l.*, and it was not until afterwards that the balance of the fund was paid into Court. A petition is now presented by her asking that the fund shall be paid out, not in equal thirds, which prima facie is the right of the cestuis que trust, but that what is alleged to be—probably truly—a wrongful disposition of the other part of the fund should be put right, and that she, the cestui que trust who without power consented to and took the benefit of the distribution of the 400*l.* and the subsequent payment of the 400*l.* out of the trust funds, should have her share increased and the other shares diminished so as to put right the wrongful dealing with the trust funds. It appears to me that her rights, whatever they may be, are a right against the trustee for breach of trust in improperly paying part of the trust funds to a person who was not a cestui que trust and who could not give a receipt for the money. But I think she has no personal right or claim against her cestuis que trust at all. I think that possibly, if the trust estate were being administered by the Court and the trustee were disallowed the payment of the 400*l.*, or

any part of it, the Court under the circumstances would or might impound the interests of the other cestuis que trust so as to reimburse the trustee the sum which had been disallowed him and which he had to pay out of his own money. But, as the matter stands, no claim has been made against the trustee for breach of trust at all, and no disallowance has been established against him in any way. The sum in Court does not represent the trust estate, but represents only a part of it, and in my opinion in the circumstances as they exist it is open to me to say, first of all, that it is impossible for me to try the question of whether there was a breach of trust and what right, if any, the trustee has against the cestuis que trust who instigated it; and secondly, that, considering the lapse of time in which no proceedings have been taken, it would not be right to stand the petition over to allow the petitioner, who alleges that she has a grievance against the trustee, to proceed to litigation upon it. I must therefore make an order for distribution of the fund in Court in equal thirds.

Solicitors: *Stow, Preston & Lyttelton; Oldfields; Fowler, Legg & Young.*

H. L. F.

Applied. Re FENTEM (*decd.*). [1950] 2 All E.R. 1073.

YOUNGER J.

1918

Jan. 11, 28; *Feb.* 6.

In re HEWETT.

ELDRIDGE *v.* ILES.

[1917 H. 58.]

Will—Construction—Condition in Restraint of Marriage.

Testator gave to an unmarried woman with whom he cohabited an annuity of 500*l.* for life without any condition as to marriage. By codicil made in anticipation of the birth of a son, subsequently born, he revoked that annuity and gave her an annuity of 1200*l.* for life, and declared that if she should marry after his death she should be paid an annuity of 800*l.* in lieu of the 1200*l.*, and directed his trustees after her marriage to apply a sum of 400*l.* a year or part thereof for the maintenance and advancement of his son till twenty-one, and on his attaining twenty-one to pay him any accumulated balance and thereafter to pay him an annuity of 400*l.* till her death. He devised his real estate for the benefit of his son and charged all his estate with payment of the annuities. By a codicil made after the birth of the son he repeated the provisions of the earlier codicil:—

Held, that the effect of the gift was an annuity of 1200*l.* only until marriage with a gift over of 400*l.* of it on marriage and a residuary annuity of 800*l.* for life.

Webb v. *Grace* (1848) 2 Ph. 701 applied.

The rule of construction is the same in the case of a will and of a deed.

But *held*, also, that even if the condition was a condition subsequent it was valid, the intention and object of the testator being to make provision for the child, not to restrain the marriage of the mother.

A condition subsequent in restraint of marriage is only prima facie, and not per se, void.

The authorities on the subject discussed, and principle deduced.

BY a second codicil—the terms of the will and first codicil are not material for the purpose of this report—dated July 6, 1914, Edbert Ansgar Hewett, after giving to Alma Sydney Iris Scovern a pecuniary and a specific legacy, gave her during her life a protected annuity of 500*l.* free of all duty to be paid by equal quarterly payments for her separate use, without power of anticipation and unqualified by any condition as to marriage. By a third codicil dated March 24, 1915, made in expectation of the birth (which afterwards occurred) of a child to A. S. I. Scovern, of which the testator was the father, he revoked the annuity of 500*l.* bequeathed by

the second codicil, and, in substitution, besides making other provision, proceeded as follows: "I give and bequeath to the said Alma Sydney Iris Scovern during her life an annuity of one thousand two hundred pounds free of all duties to be paid by equal quarterly instalments the first whereof shall be paid three calendar months after my death but I hereby declare that should the said Alma Sydney Iris Scovern marry after my death from and after the time of such marriage she shall be paid an annuity of eight hundred pounds in lieu of the aforesaid annuity of one thousand two hundred pounds," with provisions following in terms similar to those contained in a fourth codicil now to be stated. By the fourth codicil, dated September 10, 1915, made after the birth on July 14, 1915, of the child the testator's son and infant defendant, he again revoked the bequest of the annuity of 500*l.* given by the second codicil, and, after a specific bequest, proceeded in words identical with those already quoted from the third codicil; he then went on: "And I hereby declare that the said annuity shall be for the separate use of the said Alma Sydney Iris Scovern without power of anticipation and that if she shall commit permit or suffer any act default or process whereby but for this present provision the said annuity shall become vested in or payable to any other person or persons the said annuity shall immediately cease and determine as if she were dead." Then followed: "I further direct that from and after the marriage of the said Alma Sydney Iris Scovern the trustees of my will shall apply the sum of four hundred pounds per year or so much thereof as they in their absolute discretion shall think necessary for and towards the maintenance care and education and advancement in life of my son by the said Alma Sydney Iris Scovern until he shall attain the age of twenty-one years with power to apply the balance of the said sum of four hundred pounds unapplied in any year in any subsequent year And I direct that my trustees from and after the marriage of the said Alma Sydney Iris Scovern shall accumulate and invest the unapplied balance of the said sum of four hundred pounds per year and pay the same to my said son upon his attaining the age of twenty-one years and from and after my said son shall have attained that age I direct my trustees in case the said Alma Sydney Iris Scovern shall then be alive and have married after my death to pay

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to my said son an annuity of four hundred pounds until the death of the said Alma Sydney Iris Scovern And I further direct that during the lifetime of the said Alma Sydney Iris Scovern any balance arising from the yearly income arising from my estate after providing for the payment of the said annuities to the said Alma Sydney Iris Scovern, my said son," two nieces and an annuity to his stepmother, "shall be accumulated and invested and such accumulations from time to time applied" as therein mentioned. He made a devise of his real estate ultimately for the benefit of his son, and charged all his estate with the payment of the annuities, and in other respects confirmed his will and first three codicils. He died on November 24, 1915, and his will was duly proved. On March 4, 1916, A. S. I. Scovern intermarried with her present husband.

Younger J. found as a fact that she had not been married before.

An originating summons was taken out by executors and trustees of the will to determine, inter alia, whether the annuity to which Alma Sydney Iris Scovern was entitled was from the date of her marriage 1200*l.* or 800*l.*

E. G. Rand, for plaintiffs.

H. Terrell, K.C., and *E. D. Chetham-Strode*, for A. S. I. Scovern. The language of the will creates a condition subsequent and not a conditional limitation, and the rule as to personal estate or as to a mixed fund of real and personal estate is that where there is a gift to a spinster coupled with a general restraint against marriage the condition is void: Jarman on Wills, 6th ed. pp. 1525, 1539; *Morley* v. *Rennoldson* (1); *Bellairs* v. *Bellairs* (2); *In re Bellamy.* (3) The clause in question reducing the amount of the annuity on marriage is, therefore, void and the full amount continues payable.

Harold Burrows, for infant. First, the gift, on the true construction of the whole clause, is a conditional limitation and free from objection: *Webb* v. *Grace* (4); *Scott* v. *Tyler* (5); *Sheffield* v. *Lord Orrery* (6); *Allen* v. *Jackson.* (7)

(1) (1843) 2 Hare, 570; [1895] 1 Ch. 449.
(2) (1874) L. R. 18 Eq. 510.
(3) (1883) 48 L. T. 212.
(4) 2 Ph. 701.
(5) (1788) 2 Dick. 712.
(6) (1745) 3 Atk. 282.
(7) (1875) 1 Ch. D. 399.

Secondly, even if the language is properly construed as creating a condition, the object was to provide for the child in the event of the change of circumstances which would follow from the marriage of the mother, and a condition with this object in view is equally free from objection: *Allen* v. *Jackson* (1); *Newton* v. *Marsden*. (2) [He also cited *Carrodus* v. *Carrodus*. (3)]

On either ground, therefore, the reduction of the annuity from 1200*l*. to 800*l*. is valid and takes effect.

C. J. Mathew, K.C., and *J. F. W. Galbraith*, for a reversioner. The validity of the disposition depends upon the intention of the testator to be gathered from the whole will—whether he intended to put a fetter on marriage or to make a separate provision in favour of his son in the event of the mother marrying: Jarman on Wills, 6th ed. p. 1541. The latter, not the former, is the dominant intention, and thus the case is within the decision of Kindersley V.-C. in *Potter* v. *Richards* (4), which is very similar to the present case. The present disposition should, if necessary, be construed as a limitation in order to carry out the testator's intention: Jarman on Wills, 6th ed. p. 1463; *In re Moore* (5); *Heath* v. *Lewis* (6); *Jones* v. *Jones*. (7)

F. G. Underhay and *J. F. Carr*, for other parties.

[Theobald on Wills, 7th ed. p. 625, was also cited.]

H. Terrell, K.C., in reply. The other side say that the rule invalidating a condition on marriage only applies where the object is to restrain marriage, and that here the object was not to restrain marriage but to provide for the child. They also say that the clause of the codicil must be construed as a conditional limitation and not as a gift followed by a condition subsequent. As to the first, the rule is founded in, and derived from, the canon law. A condition attached to a gift to a bachelor or a spinster for life, reducing the gift in case of marriage, is, and has always been, bad: *Lloyd* v. *Lloyd*. (8) There the condition was held bad as to a spinster but good as to a widow. That case differentiates the exemption which has been introduced as to a married woman, but emphasizes the

(1) 1 Ch. D. 399.
(2) (1862) 2 J. & H. 356.
(3) [1913] Vict. L. R. 1.
(4) (1855) 24 L. J. (Ch.) 488.
(5) (1888) 39 Ch. D. 116.
(6) (1853) 3 D. M. & G. 954.
(7) (1876) 1 Q. B. D. 279.
(8) (1852) 2 Sim. (N.S.) 255, 263.

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rule established as to one unmarried: *Bellairs* v. *Bellairs* (1); *Newton* v. *Marsden.* (2) Cases cited by the other side have no application. *Webb* v. *Grace* (3) was a case of contract and does not apply to the case of a voluntary gift by way of legacy: *Milroy* v. *Lord.* (4) The exemption applies equally to a widower marrying again as to a widow: *Allen* v. *Jackson.* (5) There the general rule is recognized. *Scott* v. *Tyler* (6) does not help. *Jones* v. *Jones* (7) does not touch the question. There is no case where it has been held that the intention of the testator is to be looked at to find out whether the condition is valid or not.

Secondly, this is the case of a condition subsequent, not of a conditional limitation. It is a question, not of what the testator intended to do, but of what is the meaning of the words which he has used: *Grey* v. *Pearson* (8); *Monypenny* v. *Monypenny.* (9) The real meaning of intention is in the words used, not in motive or object. The Court is not at liberty to say that as the testator, in wishing to provide for the child, has proceeded to do so by way of condition subsequent, which would be fatal to his wish, therefore it will construe it as a conditional limitation so that it may give effect to it: *Abbott* v. *Middleton.* (10) The Court must construe the words used and not attempt to give effect to motive or object. To do otherwise would be contrary to all principles of construction. The will has first to be construed without any regard to the rule as to validity or invalidity, and then apply the rule or not, as the case may be. Form makes all the difference. The testator has deliberately sought to effect his object by way of a condition subsequent. The condition is bad according to law, and the gift stands: *In re Moore.* (11)

Cur. adv. vult.

Feb. 6. YOUNGER J. The question I have to determine is whether a lady described by the testator as Alma Sydney Iris Scovern, and in this judgment referred to as Mrs. Scovern, is from the date of her

(1) L. R. 18 Eq. 510.
(2) 2 J. & H. 356, 366.
(3) 2 Ph. 701.
(4) (1862) 4 D. F. & J. 264, 274.
(5) 1 Ch. D. 399.
(6) 2 Dick. 712.
(7) 1 Q. B. D. 279.
(8) (1857) 6 H. L. C. 61, 106.
(9) (1861) 9 H. L. C. 114, 146.
(10) (1858) 7 H. L. C. 68, 114.
(11) 39 Ch. D. 116, 129.

marriage with her present husband entitled for the rest of her life, under the fourth codicil of the testator's will, to an annuity of 1200*l.* per annum or to one of 800*l.* per annum only. [His Lordship stated the facts and the terms of the gift, and continued:] The question is whether the provision reducing her annuity to 800*l.* upon her marriage is or is not one which has any force or effect. The whole matter was exhaustively explored in the arguments before me, and many of the numerous authorities bearing upon it were cited and discussed. The subject is proverbially difficult. On the one hand as Vaughan Williams L.J. said in *In re Whiting's Settlement* (1): "This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole. We are told that the law on this point has been partially imported into our system of law from the Roman law, and that this was done through the Ecclesiastical Courts. And then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the Ecclesiastical Courts, just as the Ecclesiastical Courts did not adopt in its entirety the Roman law. And eventually, as a matter of history, we find ourselves face to face with this state of things—that the Court of Chancery had to administer rules of law which they did not think very fair or very just, and that they were constantly straining the rules, by which they yet declared that they were bound, in order to escape from them." On the other hand you find Sir G. Jessel M.R. in *Bellairs* v. *Bellairs* (2) saying this: "It is no part of my duty to make new law simply because I think the old law unreasonable; that is the province of the Legislature and not of a judge. Where I find a point decided, however I may lament the result, I think I am bound to follow the decision, and to construe it fairly, and not seek to evade it or fritter it away by introducing distinctions only invented for the purpose of pronouncing another decision, which in my opinion would be more in conformity with reason. In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down, is void. I consider that to be the law of the Courts of Equity." In these circumstances caution is necessary, especially in a case like the present, where it is, as I think, quite apparent from

(1) [1905] 1 Ch. 96, 115. (2) L. R. 18 Eq. 510, 513.

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the course of his testamentary bounty to this lady that the testator had no desire to penalize her merely because she might happen to marry after his death. It is in my view clear that, when in the event contemplated in the third codicil and realized at the date of the fourth, namely, the birth of a child of his own, he substituted for the original annuity of 500*l.* one of 1200*l.*, his object was to make what he conceived to be an adequate provision both for the mother and his child, and that the appropriation of one third of the annuity meant for both of them for the immediate benefit of the child when the mother herself married, was prompted by no objection to a marriage of hers as such, but by his desire to make it certain that the conflict of new duties undertaken by her would at least expose his child to no risk of being inadequately maintained or improperly educated. It would be strange to find that any rule based upon public policy was broken by so admirable a counsel of prudence on the part of the child's father. Remembering, however, Sir G. Jessel's injunction, I must be specially on my guard to see that a decision giving effect to that view is not contrary to established principle.

Mr. Terrell, appearing on behalf of the lady, contended that the provision of the codicil reducing the annuity on his client's marriage was void. He based his contention on the ground that here the reduction was effected by a provision which, he said, on the true construction of the whole clause, was a condition subsequent; and, when the effect of such a condition is either to extinguish or to reduce on the marriage of an annuitant an annuity previously given to her for life, then it becomes, as he said, a rule of law that the condition is void and must be altogether rejected—it cannot be saved by any motive on the part of the testator, however laudable. Once arrive at the conclusion as a matter of contruction that this subsisting interest is defeated by this subsequent condition and you must reject the condition altogether. And this is the proposition which has to be examined.

By the civil law all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void; but our Courts never adopted this rule to its full extent, and subjected it to various modifications, as was stated by Vaughan Williams L.J. in the passage I read, and as is again stated in Jarman on

Wills, 6th ed. p. 1525. It is, however, only necessary for the purposes of the present case to trace the course of decision so far as it affected one or both of two common forms of expression by means of which testators have essayed to bring about the result which the present testator plainly had in view.

The first of these common forms is to make the annuity payable to the annuitant only until marriage; the second is to give the annuity for life and then by condition subsequent to forfeit or reduce it on marriage. Under certain circumstances the effectiveness of such provisions, in whichever of these two ways they are expressed, has always been undoubted. For instance, in the case of the annuitant being a widow her annuity might effectively be cut down on subsequent marriage by any appropriate form of words: even under the civil law this doctrine did not extend to widows. But at a very early period, as is shown by a long series of decisions of which *Low* v. *Peers* (1), before Wilmot C.J. in 1770, may be taken as a leading example, it became an established rule that a limitation of an annuity to an annuitant until marriage is good. In the face of its undoubted influence in certain cases in checking marriage altogether it may perhaps be doubted whether the reason justifying this rule is fully stated by Wigram V.-C. in *Morley* v. *Rennoldson* (2), for his explanations would seem to overlook the considerations which led Kindersley V.-C. in *Potter* v. *Richards* (3) to point out that merely by adopting that form of gift a testator, if it were always to be upheld, could make effective a mere wanton restraint on marriage. And it may well be that originally, under such a limitation as that with which I am now dealing, all that the Courts did was to impute to the testator an intention to provide for a person while he or she remained single, with no thought of preventing or hindering marriage. From that, the result being in entire accordance with judicial views of what was right, it was an easy step to convert an intention originally only imputed into an intention first assumed and at the last irrebuttable. And Mr. Terrell, accepting that rule, says, by way of contrast to it, that, where a testator essayed to attain the same result by means of a condition subsequent, the opposite consequence with equal certainty followed, and the condition was necessarily and always void.

(1) (1770) Wilm. 364. (2) 2 Hare, 570.
(3) 24 L. J. (Ch.) 488.

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It is, of course, clear that the first difficulty in the way of this view is to impute to Courts, who apparently consistently objected to the rule, taking in this matter their lead from Lord Loughborough's judgment in *Stackpole* v. *Beaumont* (1), a somewhat unnecessary resolve to go further than they needed, and I cannot, after examining the authorities, agree with Mr. Terrell's contention. The better view, in my opinion, is that such a condition is and always has been only prima facie void. "Supposing," says Wigram V.-C. in *Morley* v. *Rennoldson* (2), "a gift of a certain duration, and an attempt to abridge it by a condition in restraint of marriage, generally the condition is, prima facie, void, and the original gift remains"; and it will, I think, be found that, in cases where the rule has been stated in more absolute terms, as for example by Fry J. in *In re Bellamy* (3), or by Sir George Jessel in the passage from *Bellairs* v. *Bellairs* (4), which I have already read, or where the condition has been held void, there were in fact to be found no such circumstances as those on which the Courts have in other cases relied to rebut the undoubted presumption that it is void. For it is clear that in certain circumstances the condition may have full effect. To take one example from Lord Thurlow's judgment in *Scott* v. *Tyler*. (5) "It seems also agreed on all hands," he says, "that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectional purpose of restraining marriage." And that, in the application of that principle of the civil law, the old Court of Chancery might be influenced by a gift over to other than pious uses is shown by this passage in Lord Thurlow's judgment which immediately follows: "As we receive the canon law, a bequest over to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation." The same view was thus put by Sir John (then Mr.) Romilly as counsel in *Morley* v. *Rennoldson* (6), when arguing that the condition there was void. "In all cases it is always a question of intention, whether the testator truly intends, on such an event, the benefit of the object in whose favour the legacy is limited over, or bona

(1) (1796) 3 Ves. 89.
(2) 2 Hare, 579.
(3) 48 L. T. 212.
(4) L. R. 18 Eq. 513.
(5) 2 Dick. 712, 722.
(6) 2 Hare, 574.

fide intends the simple performance of the condition, or whether his real object be to compel the celibacy of the legatee. In the former case the limitation may be good, in the latter it is invalid." And it is thus put by Blackburn J. in *Jones* v. *Jones* (1), speaking with reference to *Morley* v. *Rennoldson* (2): "The real question seems to be whether the testator intended to discourage marriage or not." Accordingly, in *Potter* v. *Richards* (3) already referred to, where a testator by a codicil gave to a lady an annuity during her life provided, inter alia, she should always remain single in circumstances singularly like the present. "It is," says Kindersley V.-C., "a gift of this annuity during the life of Jane Potter provided she remains single; and the reason of that proviso being inserted is explained by the testator himself in the codicil, that if she married, then her child, who was the illegitimate child of the testator, would be neglected. He, therefore, introduces this proviso with the object of preventing the child from being neglected, and that condition is, I think, incorporated with the gift; and my opinion is, that on that ground it would be good . . . . In this case, ... there is not a mere wanton restraint upon marriage, but the proviso is inserted expressly to protect the child of the testator." It is true that in that case the testator gave his reason for making the annuity to cease on the annuitant's marriage. If, however, by a sound construction a similar reason for the testator's action in the present case is rightly inferred from his testamentary writings, the effect ought, it would seem, to be the same as if that reason had been expressed in words. And on the other hand, while in *Potter* v. *Richards* (3) there was, as here, a gift over, it was less strong for present purposes than that which we find in this codicil, for the gift over was not, as in the present case, for the benefit of the child, but for that of a stranger. And by itself the presence of such a gift over has, in the view of the Court of Chancery, in contrast with that of the civil law, always been of importance towards making effective the condition in such cases. In *Marples* v. *Bainbridge* (4) Plumer V.-C. says: "When there is a bequest, like the present, of personal property, upon a condition subsequent"—that the legatee continue unmarried—"and no bequest over on breach of the

(1) 1 Q. B. D. 279, 281.
(2) 2 Hare, 570.
(3) 24 L. J. (Ch.) 488, 489, 490.
(4) (1816) 1 Madd. 590, 592.

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condition, the condition is considered only in terrorem," and it is void.

Believing, therefore, on these grounds the true conclusion to be that such a condition subsequent is only prima facie void, and taking the view I do of the testator's intentions in this case, of the object he had in mind, which was in no way aimed at the continued celibacy of Mrs. Scovern, I hold that, even if this condition be strictly a condition subsequent, it is in the present case quite effective, and in so holding I am, as I think, giving effect to the only rational principle that can be extracted from the decisions.

But there is another, and it may be a less debatable, ground on which to base my judgment. In my opinion, the real effect of the gift here to Mrs. Scovern is that she is given an annuity of 1200*l.* only until she marries, with a gift over of 400*l.*, part of it, on her marriage, she receiving the residuary annuity of 800*l.* for the rest of her life. In *Webb* v. *Grace* (1) John Webb covenanted to pay to Eliza Castle " for and during the term of her natural life, subject to the proviso hereinafter contained, an annuity of 40*l.* : provided always and it is hereby declared and agreed by and between the parties hereto, and it is the true intent and meaning of these presents that in case the said Eliza Castle shall at any time hereafter happen to marry, then from and immediately after her marriage the said annuity of 40*l.* shall be and is hereby reduced to 20*l.* only, which said sum of 20*l.* shall in such case be paid and payable unto the said Eliza Castle from the time of her marriage, for and during all the remainder of her life, any thing hereinbefore contained to the contrary notwithstanding." Lord Cottenham, in a judgment upholding the validity of such a condition which is very often cited, said : " The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose. *Richards* v. *Baker* (2), *Sheffield* v. *Lord Orrery* (3), *Gordon* v. *Adolphus* (4), were cited in the argument. If, then, this grant is a grant of 40*l.* per annum until marriage, and, from that event happening, of 20*l.* per annum for life, there can be no doubt

(1) 2 Ph. 701, 702.
(2) (1742) 2 Atk. 321.
(3) 3 Atk. 282.
(4) (1769) 3 Bro. P. C. 306.

but that such a gift is lawful, and that after marriage there can be no demand for the 40*l.* per annum." Then after an interval he says: "The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay 40*l.* per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law as acted upon in the cases referred to. One of them, indeed—*Sheffield* v. *Lord Orrery* (1)—is upon this point stronger than the present, for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition giving the property over in the event of marriage; and Lord Hardwicke said that the gift over was to take effect on the marriage." There seem to be only two possible grounds of distinction between that case and the present. The first is that there, but not here, the proviso is heralded by the warning in the clause of gift "subject to the proviso hereinafter contained." Mr. Terrell, however, placed no reliance on that distinction. And rightly, as I think: see *In re Machu.* (2) The second ground of possible distinction is that that was a case of a deed; here we are dealing with a will. In this matter, however, the rules of construction are the same whether the instrument in question be a deed or a will: see *In re Whiting's Settlement.* (3) And I would add that, in my opinion, this codicil is on this point clearly distinguishable from *In re Bellamy* (4), where the testator proposed by codicil to take away by condition subsequent the property previously given unconditionally by the will.

In the result, therefore, this lady is, in my opinion, since the date of her marriage and for the rest of her life entitled to an annuity of 80*l.* and no more.

Solicitors: *Bird & Eldridges; Griffith & Gardiner.*

(1) 3 Atk. 282.
(2) (1882) 21 Ch. D. 838, 845.
(3) [1905] 1 Ch. 96, 125.
(4) 48 L. T. 212.

A. L.

YOUNGER J.

1918

Feb. 12, 13, 26.

In re FRANCKE & RASCH.

[1917 F. 327.]

War—Trading with Enemy—Business in England of Enemy Firm wound up—Bills of Exchange drawn by Firm payable in Germany—German Emergency Legislation—Postponement of due Date—Forfeiture of Interest—Claim of Holder against Assets of Business—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 46, *sub-s.* 2 (*a*); *s.* 72, *sub-s.* 5—*Trading with the Enemy Amendment Act*, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 1, 2, 3, 4.

Bills accepted payable in an enemy country after the outbreak of war had been drawn by an enemy firm carrying on business in England, and purchased from the firm before the war by an English bank, in whose hands they remained unpaid. The due date according to the tenor had passed, but presentment had not been made. Emergency legislation of the enemy country since the war postponed the maturity of bills till further notice, and in the case of British creditors forfeited interest between the original due date and the end of the period of postponement. On a claim by the bank against the assets in a winding up of the business of the firm under the Trading with the Enemy Amendment Act, 1916:—

Held, that the due date, being determinable by the law of the enemy country where the bills were payable, had not yet arrived, and the claim, therefore, failed.

Rouquette v. *Overmann* (1875) L. R. 10 Q. B. 525 applied.

By an order of the Board of Trade, dated February 15, 1917, the business in the United Kingdom of Francke & Rasch, an enemy firm (hereinafter referred to as the firm), was ordered to be wound up under the Trading with the Enemy Amendment Act, 1916, s. 1, and Mr. Edward Cecil Cooper was appointed to control and supervise the carrying out of the order and to conduct the winding up. The business, which was carried on at 37, Fenchurch Street, London, E.C., was that of coffee merchants. It consisted largely in exporting coffee to foreign countries, and, in particular, Germany and Austria. Payment for the coffee so exported was made by bills of exchange drawn by the firm upon the foreign consignees and accepted by them. These bills, when accepted, were sold or discounted by the firm, and collected in due course by the purchasers from the acceptors. Claims, which were the subject-matter of this summons, were made by Martin's Bank, Limited, and by Messrs. De Pury Gautschi & Co. in respect of a number of these foreign bills, purchased by them from the firm before the outbreak of the present war (namely, August 4,

1914), now long overdue according to their tenor, and all of them (it was alleged) still unpaid. Most of the bills in question were accepted payable in Germany, some of them, however, were accepted payable in Austria.

German legislation on the matter, passed since the outbreak of war, was summarized by Younger J. as follows :—" There is, first of all, a series of Ordinances dealing with the claims of persons residing outside Germany, irrespective, as I understand, of any enemy character attaching to them. No such person is permitted to enforce by proceedings in any German Court any pecuniary claim which had come into existence before July 31, 1914. These Ordinances, however, creating, as they do, a close time during which foreign creditors are debarred from the assistance of the German Courts, do not deprive the creditor of any right to interest or damages to which he is entitled under the ordinary law by reason of his debtor's delay or default. Secondly, by a further series of Ordinances, the first of which was promulgated on August 10, 1914, the due date of all bills of exchange drawn outside Germany and payable in Germany which had not fallen due on or before July 31, 1914, was postponed for nine months, but so that interest at the rate of 6 per cent. per annum was to be added to the amount of the bill on certain conditions. These Ordinances did not enable the foreign bill-holder to enforce his claims in a German Court during the continuance of the close time already referred to, but they secured to him his full remedies in respect of interest and the like at its termination. So far, I have referred to Ordinances applicable to the claims of persons outside Germany generally. On September 30, 1914, however, a third series of Ordinances was initiated. On that day a penal Ordinance was promulgated at first directed against Great Britain and her dependencies ; by a later Ordinance extended to other enemies of Germany. The Ordinance of September 30 provided, by s. 2, that the maturity of all pecuniary claims of persons residing in British territories was to be deemed postponed until further notice as from July 31, 1914, or in case of claims having matured or maturing at a later date as from such later date, and that no interest could be claimed in respect of the period of postponement. Sect. 3 enables a debtor to obtain his discharge by lodging the sum (or securities) due to the creditor with the Imperial Bank for

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the creditor's account. Sect. 4 is as follows: 'In the case of bills of exchange in respect of which the time for payment and for protesting for non-payment has not expired on the coming into force of this Ordinance and which may not have been protested the time at which presentment for payment and protest for non-payment is permissible and required is by reason of the prohibition of payment and of the postponement of the maturity postponed until this Ordinance has ceased to be in force. The period of time within which presentment and protest have to be effected after the date at which this Ordinance shall have ceased to be in force will be determined by the Imperial Chancellor.' Sect. 8 declares that the Imperial Chancellor is to determine the date at which the Ordinance shall cease to be in force. The Ordinance referred to was, Dr. E. J. Schuster points out, applicable originally exclusively to persons residing in British territories, and its provisions have in the meantime been extended, subject to modification in certain cases, to persons residing in France, Russia, Portugal, Italy, Egypt, and French Morocco, but even now they leave unaffected several countries actually at war against Germany. The other Ordinances do not alter the rights of the creditors, but merely suspend their remedies. But the Ordinance of September 30, 1914, by depriving the creditor of the interest to which he would be entitled under the ordinary German law, modifies the rights of the parties to the advantage of the German and to the disadvantage of the non-German party."

The controller took out this summons for directions whether he ought to admit, provide for, or otherwise deal with the claims (*a*) in respect of bills accepted and payable after August 4, 1914, which at that date and still were held by the claimants, (*b*) in respect of bills accepted and payable some before and some after August 4, 1914, which before that date had been sent to the claimants' agents abroad for collection.

Sheldon, for the controller.

Sir Gordon Hewart, S.-G., and *Austen-Cartmell*, for the Board of Trade. The bills are not debts or liabilities within the meaning of sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916. By s. 45 of the Bills of Exchange Act, 1882, a bill must be duly presented for payment, and, if it is not, the drawer is discharged.

By s. 46, sub-s. 2 (*a*), presentment is dispensed with where, after the exercise of reasonable diligence, it cannot be effected. By s. 72, sub-s. 3, the duties of the holder with respect to presentment are determined by the lex loci where the act ought to be done—here Germany or Austria. By sub-s. 5 the due date of a bill, drawn in one country and payable in another, is determined by the lex loci where it is payable—here Germany or Austria. The German legislation postponed payment of bills, first for nine months from July 31, 1914, and then till further notice. There is, therefore, no question of dispensing with presentment; payment has been postponed and the due date has not yet arrived. The liability of the firm is merely contingent and not a liability under sub-s. 3 of s. 1 of the Act of 1914. The controller can only pay "debts," and contingent liabilities are not "debts."

[YOUNGER J. The other side will, I imagine, say these are present obligations.]

They cannot succeed whichever way they put it. If they say they are present obligations, then the time for presentment has been indefinitely postponed by the German legislation. Then s. 45 of the Act of 1882 comes in and the drawer cannot be made liable. By the English law, a holder of a bill cannot require payment by the drawer unless presentment has been made at the due or postponed date or been excused. Without these the liability does not ripen into a due debt. If the German law applies, the holders here cannot be said to have made presentment. If the German law does not apply and the English law does, then it cannot be said that the holders ought to be excused presentment. Sect. 1 of the Bills of Exchange Act, 1914 (4 & 5 Geo. 5, c. 82), which is part of English emergency legislation passed since the outbreak of war, excuses delay in presentment, but does not excuse presentment itself. It has to be read in connection with sub-s. 1, and not in connection with sub-s. 2, of s. 46 of the Act of 1882. Sect. 46, sub-s. 1, of the Act of 1882 and s. 1 of the (Bills of Exchange) Act of 1914 together provide for delay in presentment. A bill does not become a present liability till presentment. The German legislation here applicable is not, as it was in *In re Fried Krupp Actien-Gesellschaft* (1), confiscation; it was only a moratorium.

(1) [1917] 2 Ch. 188.

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[YOUNGER J. There is no Austrian legislation proved. What is the position in regard to the bills payable in Austria ?]

The onus is on the other side to show presentment is excused.

[YOUNGER J. If the holder attempted to make presentment abroad, would he not render himself liable to criminal prosecution here for communicating with the enemy ?]

No ; he could apply for a licence to communicate with the enemy through a neutral. The Court should assume the Austrian law is the same as the German in postponing the due date of the bills. But, if not, the other side have not shown that the necessary conditions have been fulfilled. The onus is on them, and is not, and cannot be, discharged. If any claim of presentment through the American consul is advanced, it cannot be supported.

Douglas Hogg, K.C., and *F. K. Archer*, for Martin's Bank. This question affects many banks. The due date of the bills must be taken to be the original date, and, if not, at latest, April 30, 1915, namely, nine months after July 31, 1914. Unless it must by virtue of some law which this Court will recognize be deemed to be otherwise, the due date has already passed. A moratorium is for the benefit of drawer and holder and acceptor. *Rouquette* v. *Overmann* (1) is a difficulty in the bank's way, but the decision does not really apply, though the dicta are of importance. It would have made all the difference in that case if France had been an enemy. The extension of time there applied in the case of a country with which Great Britain was at peace, but it does not apply in the case of a country with which Great Britain is at war. Emergency legislation is meant to supply a country's own subjects with a measure of relief. The German Ordinances were designed to injure this country and will be disregarded in our Courts. Thus the matter is brought back to this—that the bills were payable at their due date, and have not been paid. But, if that is not so, at any rate this Court will not recognize the Ordinance of September 30, 1914. It is aimed directly at British subjects and is confiscatory, and will not be regarded in any way ; it must be treated as non-existent : *In re Fried Krupp Actien-Gesellschaft.* (2) The grounds on which in that case the Ordinance was rejected apply with equal force in this case.

[YOUNGER J. The result of this argument is that the German

(1) L. R. 10 Q. B. 525. (2) [1917] 2 Ch. 188.

legislation, if unrepealed, throws the burden on the original drawer. What is the measure of the drawer's liability ?]

See *Suse* v. *Pompe.* (1) The obligation of the drawer is to pay, if the drawee does not pay, the bill at its due date ; the reason why the drawee does not pay is immaterial, whether it be that he is under no obligation as towards the drawer or because he is insolvent or, as here, because of the German legislation. Sect. 3 of the Bills of Exchange Act, 1882, deals with dishonour. Dishonour does not imply moral obliquity at all. Where a bill is dishonoured by non-acceptance there is, under that Act, an immediate remedy against the drawer, even if the due date has not arrived.

Austen-Cartmell. Every one of these bills has been accepted.

[YOUNGER J. The whole question comes back to whether the German legislation is to be regarded.]

Douglas Hogg, K.C. The drawer's contract is to guarantee payment by the acceptor or drawee at the due date according to the ordinary law of the country the law of which applies : *In re Commercial Bank of South Australia.* (2) The fact that England is at war with the country where the bills are payable is sufficient to excuse presentment under s. 46, sub-s. 2. There is no duty in the bank to make any presentment at all—no duty to go to the Foreign Office and get a licence to communicate with the enemy. Presentment being excused and the bills being overdue, there has been dishonour under sub-s. 1 (*b*) of s. 47, and under sub-s. 2 an immediate right of recourse against the drawer has accrued to the bank. Sect. 55 defines the position of the holder of a bill and supports the bank's contention. Really no enemy war legislation at all, since the outbreak of war, ought to be recognized. That is the true principle. It has, of course, exceptions, to give effect to the usages of war, e.g., in regard to exchange of prisoners : Hall's International Law, 7th ed. p. 397, pt. 3, ch. 1, s. 124 ; p. 403, s. 126 ; *Ertel Bieber & Co.* v. *Rio Tinto Co.* (3) Effect will be given to domestic and neutral, but not to enemy, war legislation. Ordinarily, foreign law must be assumed to be the same as English law, if the contrary is not proved : *Ertel Bieber & Co.* v. *Rio Tinto Co.* (3) ; but here it is admitted that Austrian and German legislation are the same.

(1) (1860) 8 C. B. (N.S.) 538. (2) (1887) 36 Ch. D. 522.
(3) [1918] A. C. 260.

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Galbraith, for De Pury Gautschi & Co. These defendants adopt the bank's arguments. The Ordinance of September 30, 1914, ought at any rate to be disregarded. The period of postponement of the due date came to an end on July 31, 1915, at the latest. The German legislation was passed for the purpose of injuring British subjects.

[YOUNGER J. The question is which of two innocent parties, the holder or the drawer, is to bear the loss.]

Ogden v. *Folliot* (1) is directly relevant on the question of rejecting the German legislation. The bills, not having been paid at the end of nine months, must be treated as having been dishonoured in Germany under ss. 45, 46, and 47 of the Bills of Exchange Act, 1882. "Providing for the discharge of liabilities" in s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916, aptly described what ought to be done in regard to the contingent liability on these bills.

Austen-Cartmell in reply. The Trading with the Enemy Amendment Act, 1916, only provides for present liabilities. Neither side is helped by *Ogden* v. *Folliot* (1): Westlake's Private International Law, 5th ed. p. 431. It is only anything penal in the German legislation that can cause it to be disregarded here. It is merely an extension of the ordinary law not to recognize the penal legislation of another country. There is no authority for the view that the English Courts will go farther than that. This German legislation is not penal or confiscatory, but commercial and, in a sense, reciprocal. It enures for the benefit of both drawer and holder as well as acceptor—all parties. It is much the same as the English emergency legislation at the beginning of the war. So far as it abolishes interest, it is, it is admitted, confiscatory. Having regard to the Bills of Exchange Act, 1882, it is going a very long way to say that the outbreak of war makes a drawer liable for what he would not otherwise be liable for. Unless s. 72, sub-s. 5, is given the go-by, it covers the case, and there is no authority that it should be given the go-by.

Cur. adv. vult.

Feb. 26. YOUNGER J. (after stating the facts). No evidence specially directed to the Austrian law on the subject, emergency

(1) (1790) 3 T. R. 726.

or otherwise, has been adduced. I was, however, informed by Mr. Archer on behalf of Martin's Bank that the Austrian legislation was, in fact, identical with that passed in Germany, as to which evidence has been given. I propose, accordingly, to deal with the case upon the footing that the claim of the holders of a bill accepted payable in Austria would in no respect differ from their claim in respect of the same bill if it had been accepted payable in Germany: in terms, therefore, I will refer only to German bills. Inasmuch, also, as there is no special circumstance touching any of the bills of which Messrs. Gautschi & Co. are the holders that does not emerge in bills held by Martin's Bank, it will conduce to clearness if in this judgment I treat that bank as being the only claimants.

On that footing the bills with which I have to deal fall conveniently into two classes: 1. Foreign bills sent to Germany to the agents of the bank there for collection and never returned. These bills were accepted payable (*a*) at various dates before the outbreak of the present war; (*b*) at various dates after the outbreak of the war. 2. Foreign bills accepted before July 31, 1914, payable in Germany at various dates after the outbreak of the war, purchased before the war from the firm, and at the outbreak of war held, as they still are, by the bank.

With regard to the acceptances in the class 1 (*a*), there is very little to be said. No evidence has been adduced by the bank to show that these bills are in fact unpaid; the bills themselves are not forthcoming. I see no sufficient reason to doubt that the proceeds of all of these bills are in the hands of the German agents of the bank. The claim so far as these bills are concerned fails, in my opinion, for lack of evidence.

As to class 1 (*b*), the bills included in it may or may not have been met. There is no evidence on the subject one way or the other. The bills themselves are not produced, and no notice of dishonour, if any of them were dishonoured, has been given to the firm. The bank in those circumstances cannot complain if I treat their claim in respect of these bills as being governed by the considerations applicable to class 2, and it is with reference to the bills in that class that the real difficulty arises.

The claim of the bank raises considerations of wide-reaching importance.

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The facts are not in dispute. Every one of the bills in question has been duly accepted. None of them has in fact been presented for payment. The due dates of all of them according to the tenor of the bills are long since past. In these circumstances the claim originally made by the bank in respect of these bills, all of which were accepted payable in marks, was to recover the sum for which they had been so accepted, translated into English currency at a uniform rate of 20.50 to the pound, no claim being made for interest in respect of delay in payment. And it is, in fact, the sum so arrived at which is set forth in the summons as constituting the bank's claim. At the bar, however, the demand made by Mr. Hogg on behalf of the bank was assessed on a different principle. He claimed on their behalf the value of these bills calculated at the rate of exchange notionally current between this country and Germany at their respective due dates, with interest on the sum so ascertained at the rate of 6 per cent. per annum until payment; or, in the alternative, the value of all the bills, treating them as payable on April 30, 1915, the exchange being calculated at the notional rate current on that day, with interest at the same rate of 6 per cent. until payment.

It will be seen later that the claim for interest made at the bar by Mr. Hogg is very vital to the bank's case as ultimately formulated by him. The Solicitor-General, in answer to it, contended, on behalf of the controller, that the bank's claim should be altogether rejected. He insisted, first of all, that in this jurisdiction, having regard to the special terms of the Act of 1916, it is only claims which are made in respect of either debts of the business or its liabilities in the sense in which that word is used in the statute that may be recognized by the controller. I agree with that statement, and, as I have more than once had occasion to say in other cases, these liabilities do not, in my opinion, extend to or include future or contingent liabilities which, if there were no winding up at all in progress, would not instruct a claim to some present payment in respect of them. There is no provision in this statute analogous to s. 206 of the Companies (Consolidation) Act, 1908. The liabilities with which this Act is dealing are shown by s. 1, sub-ss. 3 and 4, to be liabilities capable of ranking for immediate payment; no machinery is provided for assessing present values of future or otherwise unascertained or contingent claims. These, in my judgment, are reserved by the Act to be dealt

with by the owners of the business being wound up as they arise, the liability of these owners in respect of such claims being, as explained in *In re Dieckmann* (1), left entirely unaffected by any winding up of a business under the Act. I agree, therefore, with the Solicitor-General's contention that the bank's claim can only be admitted in this winding up to the extent to which the bank can show that their claim would have justified a demand for a present payment from the firm as the owners of this business, had there been no order made for winding it up.

The main claim of the bank, however, is not affected by this view of the statute. Putting it broadly, that claim, as I have pointed out, is one to recover the moneys, with interest, which the different acceptors, it is said, ought to have paid and have not paid. It results, if well founded, in a demand for present payment of the amount claimed. There are, it is true, certain preliminary difficulties in the bank's way. The bills have none of them been presented for payment, and s. 45 of the Code provides that, subject to its provisions, a bill must be duly so presented, under pain, in default of the drawer and indorsers being discharged. The bank, however, point out that to present any of these bills in Germany for payment after the outbreak of war would not merely have been difficult, if not impossible—it would, they say, have involved an intercourse with the enemy, criminal according to the law of this country. They contend, therefore, that, in the circumstances of this case, it is an understatement of their position to say that no presentation could, after the exercise of reasonable diligence, have been effected by them, and they urge that under s. 46, sub-s. 2, of the Code such presentment ought to be dispensed with. I think that is right. I cannot hold that the bank were bound to seek a licence of the Crown so as to render innocent what would otherwise have been criminal intercourse with an enemy country, nor am I satisfied that, even if intercourse had been authorized on this side, any presentment required by German law (see s. 72, sub-s. 3, of the Code) would have been possible on the other.

The answer to the bank's first claim must, therefore, be looked for elsewhere, and the Solicitor-General's main contention was that it is to be found in s. 72, sub-s. 5, of the Code, as affected by the German

(1) Ante, p. 331.

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emergency legislation with reference to this subject passed since the outbreak of the war and described by Dr. E. J. Schuster in his affidavit filed on the summons. Sect. 72, sub-s. 5, of the Bills of Exchange Act provides that, when a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. The due date, therefore, in the present case is to be ascertained, so says the Solicitor-General, by the German legislation to which I have referred. That, as described by Dr. Schuster, is somewhat complicated, but its effect may be summarized for present purposes as follows : [His Lordship summarized it as set forth above on p. 471, and continued :] The result of all the above, so far as material, appears to be as follows : (1.) By German Ordinances affecting all persons resident out of Germany no holder of a bill of exchange accepted prior to July 31, 1914, and payable in Germany after that date can by proceedings in any German Court enforce payment. That so-called close time is still in existence ; there is no reason to suppose that it will come to an end before the termination of the war. When the German Courts are open to such claims, however, the amount recoverable under these Ordinances will be the amount of the acceptances, with interest thereon at the rate of 6 per cent. from the due date or from April 30, 1915, whichever is the later date. Up to the present, however, no claim can be prosecuted in Germany either for principal or interest. This point, in this jurisdiction, is very material on the point first made by the Solicitor-General, as will appear later on. (2.) By the Ordinance of September 30, 1914, affecting Great Britain and her dependencies, maturity of the bill in the hands of a British holder accepted payable in Germany after July 31, 1914, is now postponed " until further notice," and his right to interest for the period between the original due date and the date at which the Imperial Chancellor will or may put an end to the postponement is irrevocably forfeited.

It will be noted that it is this forfeiture of interest which, as a matter of substance, differentiates, under German war legislation during the continuance of the war, the position of particular enemy holders from that of other holders of bills outside Germany, and doubtless it was mainly for that reason that the bank's claim as ultimately formulated by Mr. Hogg was, as I have stated, modified

to include a claim for interest, which in the first instance was not put forward at all.

Now the result of that German legislation very clearly is that in Germany at this moment " the due date " of the bills now in question has, within the meaning of s. 72, sub-s. 5, of the Code, not yet arrived. What is the position of the bank as holders of these bills as against the makers in face of that fact ?

Great assistance in answering this question is furnished by the judgment of Cockburn C.J. in *Rouquette* v. *Overmann*. (1) In that case—I am reading from the head-note—" a bill of exchange was drawn and indorsed by the defendants in England upon French subjects resident in Paris, and was accepted by them in Paris. The bill on the face of it was payable on the 5th October, 1870 ; before that date the Emperor of the French, in consequence of the war with Germany, enlarged the time for the payment and protesting of current bills of exchange for one month ; and the time was afterwards enlarged from time to time by the government of France for the time being. By these enlargements of time the defendants' bill did not become payable till the 5th September, 1871. On that day the bill was presented to the acceptors and payment refused ; and it was duly protested and due notice of dishonour, &c., given to all the parties." It was there decided that presentation of the bill on September 5, 1871, was sufficient and timeous presentation, and that the defendants as drawers were liable to the holders, and in the course of his judgment Cockburn C.J. explained with great fulness, in regard to the problem there presented, the nature of the contract between the maker of a bill accepted payable abroad and a transferee for value of that bill. Having stated (2) that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, he thus describes the true nature of the contract (3) " which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having

(1) L. R. 10 Q. B. 525. (2) L. R. 10 Q. B. 535.
(3) L. R. 10 Q. B. 536.

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been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees inter se shall be governed. It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by ex post facto legislation in the foreign country. A strong argument ab inconvenienti may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation."

Then, a little later, Cockburn C.J. says (1): "To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after,—as was done by the Act of 34 & 35 Vict. c. 17,—the period at which the liability of the indorser on non-payment by the acceptor would arise, would be pro tanto delayed. To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility."

The remarkable similarity of that case to the present is obvious, but Mr. Hogg distinguishes it on the ground that the Ordinance which in Germany now stands in his way, that of September 30, 1914, unlike the French Ordinance with which Cockburn C.J. had to do, is penal: it is not conformable to the law of nations, so that its validity will not be recognized in an English Court. He says, further, that, so far as that Ordinance purported to cancel the liability for interest, this Court has already—*In re Fried Krupp Actien-Gesellschaft* (2)—refused to recognize it. The position, as he puts it, may accordingly be thus expressed: These bills must be deemed to be dishonoured at the latest on April 30, 1915, because the only justification for their non-payment after that date is a German reprisal Ordinance which the Court will not recognize.

To this contention, however, there may, it would seem, at least in

(1) L. R. 10 Q. B. 538. (2) [1917] 2 Ch. 188.

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this jurisdiction, be two answers. The first is that the bank here, apart altogether from the Ordinance of September 30, 1914, are, under the series commencing with that of August 4 and the series commencing with that of August 10, 1914, precluded, in common with all creditors out of Germany, from enforcing payment of these bills against the acceptors; there is nothing penal or exceptional in these Ordinances; they have their counterpart in the emergency legislation of most belligerent countries; the principle of them will be found in the common law of England without assistance from any emergency legislation whatever. Unless, therefore, as was indeed contended by Mr. Archer, no Ordinance or legislation by the enemy during war, whether penal or vindictive or merely conservative, except it be to give effect to the usages of war, can be recognized for any purpose in this Court, it would appear that, irrespective altogether of the Ordinance of September 30, in substance and in fact the due date of these bills has been postponed in Germany, and no present claim in respect of them by the bank against the firm has, on the principles of *In re Dieckmann* (1), yet arisen. Can, then, the mere existence of the Ordinance of September 30, 1914, put the bank as against the firm in a better or other position than would have been theirs had they been neutral, say Dutch or Norwegian, holders of these bills? Mr. Austen-Cartmell says No; and he went further. This Ordinance of September 30, while it might not be cognizable in these Courts so far as it purported to confiscate interest, was, he contended, in point of principle unobjectionable so far as it postponed the payment of principal. For the principal, accordingly, there was no present claim open to the bank, nor, apart from principal, could there be any present claim for interest.

Now I feel strongly the force of these contentions: if well founded, they would, in this jurisdiction, justify the controller in rejecting the bank's claim on the grounds first contended for by the Solicitor-General. I prefer, however, in the present case to base my actual decision on a broader ground—one good, if at all, in every Court.

I will assume, therefore, without so deciding, that the Ordinance of September 30, 1914, must be read as a whole. I will assume further, without so deciding, that this Court will not to any extent

(1) Ante, p. 331.

recognize it when it is the only defence to a claim against a German debtor on a German contract. It is, however, one thing not to recognize its validity; it is another thing, ostrich-like, to ignore its existence. And the bank's claim here is not against the German acceptors; if it were, *Krupp's Case* (1) might be immediately relevant. The bank's claim is against the business of this firm as drawers, and the question to be determined is not so much whether the Ordinance of September 30, 1914, will be recognized in this Court as valid, but is which of these parties, the holders or the drawers of these bills, is, by the contract between them, to suffer from the fact that that ordinance is law in Germany. It is for the present completely effective there to postpone the due date of payment and to relieve the acceptor of his contract to pay interest. Who is to suffer from that existing fact?

Now it is quite clear, on the principles above explained, that in an ordinary case the maker of a bill gives no guarantee to the holder that the acceptor will make payment of anything which by the law of his own country at the time of demand he is not bound to pay. Is the fact that a war between Great Britain and Germany has supervened—an event unforeseen at the date of their contract by either the firm or the bank—to be sufficient entirely to reverse the position between these two parties and make the measure of the firm's guarantee the liability of the acceptors under German law at the date of acceptance, however in fact altered by any subsequent German legislation, emergency or otherwise, that liability may be? I cannot think so. It is to my mind no more than a logical extension of the principle of *Rouquette* v. *Overmann* (2) to say that the burden and the benefit of subsequent German legislation are, as between the firm and the bank, the burden and the benefit of the bank. This Court cannot, in my judgment, as between these parties, sit in judgment on the propriety or otherwise of any foreign law: it might form one conclusion on the subject, an allied or neutral Court in the case of an allied or neutral indorser of the same bills might form another; and it is of the utmost importance in such cases that there should, if possible, be no occasion for difference on such a matter. The risk of difference can most surely be eliminated by holding, as s. 72, sub-s. 5, of the Code seems to require me to hold,

(1) [1917] 2 Ch. 188. (2) L. R. 10 Q. B. 525.

YOUNGER J. 1918 FRANCKE & RASCH, *In re.*

and as *Rouquette* v. *Overmann* (1) would invite me to hold, that it is the law of the country where the bill is payable which *sans phrase* must, if the holder rely, as he does here, on his contract with the maker, fix, in this Court, as between them for all purposes, the due date of the bill.

I say, however, advisedly, "if the holder rely on his contract with the maker." I can conceive it possible that legislation in the country of the acceptor subsequent to the date of the bank's purchase of these bills from the firm might be so confiscatory that the bank could with much plausibility claim to have their contract with the firm rescinded on the ground that the consideration had wholly failed —treating the bills, in other words, as if forged bills had been imposed upon them. The measure of liability in that event would, however, not be that which is contended for on this summons. Moreover, *Suse* v. *Pompe* (2) shows the difficulty of successfully making such a case. It is sufficient here to say that Mr. Hogg refused to set it up.

On the whole matter, therefore, I am of opinion that the claim of the bank ought to be rejected by the controller, and I direct him to reject it accordingly.

Solicitors: *Routh, Stacey & Castle; Solicitor to Board of Trade; Waterhous & Co.; Smith, Rundell, Dods & Bockett.*

(1) L. R. 10 Q. B. 525. (2) 8 C. B. (N.S.) 538, 565.

A. L.

In re KEITH PROWSE & CO., LIMITED.

PETERSON J.

1918

Feb. 6.

[1918 K. 61.]

Company—Motion to rectify Register—Directors joined as Respondents —Costs of Motion—Jurisdiction—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

Upon an originating motion under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register, directors of the company are not properly joined as respondents notwithstanding that their unjustifiable acts at board meetings may have conduced to the application. Unless they are joined at their own request the Court has no jurisdiction to make a punitive order against them for payment of the costs of the motion.

In re Tahiti Cotton Co. (1874) L. R. 17 Eq. 273 applied.

In re Copal Varnish Co. [1917] 2 Ch. 349 distinguished.

MOTION by the executors of a deceased holder of ordinary shares in the respondent company for the rectification of the register of members of the company by the entry of the applicants' names as holders of the shares.

The probate of the will of the deceased shareholder, Mr. Bryan Lanchester Jones, had been duly lodged with and registered by the company in November, 1909, but only the words "Exors. late" in red ink had been inserted in the register before the name of the deceased testator, which still remained on the register.

There were five directors of the company, but in consequence of a dispute, which was the subject of pending proceedings, between members of the board of directors of the company as to the validity of the appointment of Mr. Straus, one of the directors whose appointment and vote the chairman, Mr. Frederick Keith Jones, refused to recognize, the voting at board meetings on January 16 and 23, 1918, was equally divided. At those meetings various resolutions were proposed by the chairman, who rejected Mr. Straus' adverse vote and then, the voting being equal, gave his casting vote in favour of the resolutions and declared them carried.

At another board meeting on January 30, 1918, a resolution proposed by the chairman and declared carried by the same means directed the secretary to convene an extraordinary general meeting of the members of the company for February 11, 1918, for the

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purpose (inter alia) of considering and confirming the minutes of the proceedings at the board meetings above mentioned. The chairman also moved a resolution "That no alteration be made in the register of members of the company except under the directions of the board at which all the directors shall be present and no such alteration be made in any case where there is ground for believing that the object of the change is to affect voting at any general meeting in any case the secretary being instructed to give the chairman four days' notice of any proposed change in or addition to the register of members." This resolution was seconded by the respondent Mr. Truman and declared carried by means of the chairman's casting vote, the two applicants voting against it. Mr. Hargrove, one of the applicants, then proposed "That the probate of the will of the late Bryan Lanchester Jones having been produced to the company and marked as registered on the 15th November, 1909, the secretary of the company be instructed to add to the words 'Exors.' in the register of ordinary shares held by the deceased the names and addresses of the executors in order that such registration may be properly recorded." This resolution was declared lost by the chairman, who gave his casting vote against it. The registration of the names of the applicants as shareholders would have materially altered the voting at the meeting called for February 11 and deprived the chairman and his supporters of a majority of the votes.

The applicants now moved under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register, and, besides the company, the chairman and the director who supported him were made respondents.

At the hearing the right of the applicants to the rectification of the register was not disputed, and the only contest was whether the respondent directors could be ordered to pay the costs of the motion.

Maugham, K.C., and *G. H. Devonshire*, for the applicants. We ask that the respondent directors should be ordered to pay the costs of the motion; the chairman is really responsible for these proceedings. There is nothing in s. 32 of the Companies (Consolidation) Act, 1908, to deprive the Court of power to make the respondents pay the costs. Sub-s. 3 gives power to decide questions relating

to title, and that inherently implies power to adjudge costs. In *In re Copal Varnish Co.* (1) Eve J. ordered a respondent director, whose wilful conduct had occasioned the motion, to pay the costs of it.

F. K. Archer, for the respondent company. If the company has to pay the costs of the motion, I submit that in the circumstances it is entitled to be indemnified by the respondent directors.

H. E. Wright, for the respondent directors. These respondents are not proper parties. Without statutory authority an originating motion cannot be made against an individual. Under s. 32 there is no jurisdiction or authority for making a director a party except perhaps at his own request. Where it is sought to make a director a party, a writ and action are the proper procedure. But even if these directors are properly made respondents, there is no jurisdiction to order them to pay the costs. That was clearly the opinion of Sir George Jessel M.R. in *In re Tahiti Cotton Co.* (2), under s. 35 of the Companies Act, 1862, and appears also to have been the opinion of Eve J. in *In re Copal Varnish Co.* (1), who seems to found his order against the director to pay the costs of the motion in that case upon the fact that the director had been added as a respondent at his own request. Sub-s. 3 of s. 32 contains an express provision where title comes in question, but that very fact impliedly shows that a director cannot be made a party.

[PETERSON J. referred to the following passage in Buckley on the Companies Acts, 9th ed. p. 119: "The present section does not reproduce the language of the Companies Act, 1862, s. 35, as to costs. But its effect may be the same."]

That passage helps my contention, and I crave it in aid. An order for rectification can be made retrospective in operation: *In re Sussex Brick Co.* (3)

Maugham, K.C., in reply.

PETERSON J. stated the facts and continued: As the result of the proceedings at the board meeting on January 30, 1918, the present application was launched and the chairman and the director who supported him were made respondents. There is no resistance to

(1) [1917] 2 Ch. 349. (2) L. R. 17 Eq. 273, 281.
(3) [1904] 1 Ch. 598.

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the application for rectification of the register, as indeed it is clear there could be none, the first resolution being totally indefensible; and the only question is whether the two respondents should be ordered to pay the costs. There was a provision in s. 35 of the old Companies Act that the Court might order the company to pay the costs of an application for rectification of the register, but that provision has been omitted from s. 32 of the present Act, which says nothing as to the person who can be ordered to pay the costs. Under the old Act it was indicated in *In re Tahiti Cotton Co.* (1) that there was no jurisdiction to order any person other than the company to pay the costs of the application, and there are various other cases referred to in Buckley on the Companies Acts, 9th ed. pp. 118 and 119, which are to the same effect; and the learned author in his note to s. 32 adds: "The present section does not reproduce the language of the Companies Act, 1862, s. 35, as to costs. But its effect may be the same."

Since the Act of 1908 there has, so far as I know, been only one case dealing with this question, namely, *In re Copal Varnish Co.* (2) That was an application for rectification of the register. One of the directors, Percy Randall, wilfully refused to attend a board meeting with the object of preventing transfers from being registered, and he was added as a respondent to the motion at his own request. Eve J. said (3): "In my opinion Percy Randall has taken up an attitude in this dispute which is untenable, and, bearing in mind that he was added as a party to this motion at his own request, in making an order directing the company to rectify the register by giving effect to these transfers I must at the same time order him to pay the costs of the motion." It appears to me that the learned judge laid great stress on the fact that Percy Randall had been added as a respondent at his own request in order that he might personally contest the question, and it was on that ground that the judge thought that he was able to order him to pay the costs.

In the present case the directors have no doubt gone beyond their powers in refusing to register the names of these executors as the holders of the ordinary shares in question, and when I say "the directors" I mean, of course, those persons who refused to register

(1) L. R. 17 Eq. 273. (2) [1917] 2 Ch. 349.
(3) [1917] 2 Ch. 355.

them, namely, the two respondents. But supposing the whole board had improperly—that is, without justification—refused to register them, would the whole board be the proper parties to join as respondents to a motion of this nature? In my view they would not. The directors are the agents of the company, and in law it is the company which is legally responsible for the unjustifiable acts of its agents, and the directors are not to my mind necessary or proper parties to an application of this kind. If an order on a company to rectify the register does operate, as in my view it does, as a rectification of the register from the date when the order is made, then the only object of joining directors as respondents to the motion is that a punitive order may be obtained against them for payment of the costs. I do not think that on applications of this sort directors ought to be joined as respondents merely for this purpose.

I do not direct the respondent directors to pay the costs of the motion, but I do not give them any costs, and I make an order that the company pays the costs of the applicants.

Solicitors: *Golding, Hargrove & Golding; G. C. Whadcoat.*

R. M.

YOUNGER J.
1917
Oct. 24, 25,
1918
March 1.

In re OGILVIE.
OGILVIE *v.* OGILVIE.

[1909 O. 735.]

Will—Conflict of Laws—Election.

Testatrix died domiciled in England, having made testamentary disposition of realty in Paraguay upon trust for charity. By Paraguayan law that disposition was valid only as to one fifth, four fifths being the portion of the obligatory heirs. She bequeathed to those heirs benefits out of property in England. In an action to administer the English estate:—

Held, that the heirs must elect between what they took by the invalidity of the gift to charity under Paraguayan law and what the testatrix gave them.

Principle of *In re Bradshaw* [1902] 1 Ch. 436, *In re Oliver's Settlement* [1905] 1 Ch. 191, *In re Beales' Settlement* [1905] 1 Ch. 256, and *In re Nash* [1910] 1 Ch. 1 not applied.

ADMINISTRATION ACTION.

Margaret Ogilvie died on April 2, 1908, a widow, domiciled in England, possessed of real and personal estate in England and Scotland, and, as absolute owner in equity, of a tramway undertaking at Asuncion, in Paraguay, the property of which consisted of (inter alia) land. She had eight children, of whom four sons (Glencairn Stuart, Fergus Menteith, Gordon Albinus, Campbell Patrick) and one daughter were living at her death; of the three who had died in her lifetime, two left issue who were living and sui juris, and one had died an infant and bachelor. By her will and codicils she gave benefits to her surviving daughter, to her sons Glencairn and Fergus, and to certain of her grandchildren, including the children of her two deceased children who had died leaving issue. She made no provision for her son Gordon. To her son Campbell she gave a release in respect of moneys received by him in connection with the tramway undertaking. She did not dispose of the residue of the personal estate in England and Scotland. She gave to her sons Glencairn and Fergus and her grandson Gerald Albinus Ogilvie all her Paraguayan property upon trust for sale and to apply the proceeds for such charitable purposes as they should think fit. The tramway undertaking

had been sold and the purchase-money paid into Court. The case now came before the Court on a summons to proceed with an inquiry which had been directed on further consideration, and for the purpose of enabling the Court to ascertain the effect of Paraguayan law on the disposition of the Paraguayan property all parties agreed to be bound by an opinion of a Paraguayan jurist, which, shortly, was as follows: (1.) By the law of Paraguay the testamentary dispositions of Mrs. Ogilvie, in so far as the property situate in that republic is concerned, whether movable or immovable, real or personal, are governed by the law of Paraguay . . . . (3.) They are not valid by the law of Paraguay, inasmuch as they infringe upon the legal portions, under that law, of the obligatory heirs, and the bequest in favour of charity must, accordingly, be reduced until these portions are provided for. (4.) These portions are not to be affected in amount by reason of the obligatory heirs or some of them having, by the will, been given benefits out of property of the testatrix situate in other countries. The transmission of property locally situate is, by the law of Paraguay, considered as completely independent of any disposition of property situate outside the republic. (5.) The legal portion of the lawful descendants is four fifths of all the properties existing at the death: the children inherit per capita; the grandchildren, children of deceased children, inherit per stirpes. (6.) One fifth only of the Paraguayan property has by the will, according to the law of Paraguay, been effectually given for charitable purposes.

C. J. Mathew, K.C., and *P. S. Stokes*, for the executors.

H. Terrell, K.C., and *Austen-Cartmell*, for the Attorney-General, representing charity. The doctrine of election must be applied. The obligatory heirs taking under the Paraguayan law against the will must compensate the charities which would have taken under the will: *Orrell* v. *Orrell* (1); Dicey's Conflict of Laws, 2nd ed., Appendix, note 22, pp. 830 et seq.

Brydges, for Glencairn and Fergus and the children of deceased sons. What the testatrix intended to do, in giving to charity and disinheriting the heirs, was contrary to the law of Paraguay, by positive law, and so no election arises. The whole, not part only,

(1) (1871) L. R. 6 Ch. 302.

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of the foreign law must be taken. The principle of *In re Oliver's Settlement* (1) and *In re Beales' Settlement* (2), which was followed by the Court of Appeal in *In re Nash* (3), should be applied. So the cases relied upon in Dicey's Conflict of Laws do not apply. In those cases the testator might have done in another way effectively what he failed to do by the way he attempted. Here the testatrix could not have done in any way what she tried to do. Paraguayan law absolutely forbade, as to four fifths of the immovables, her leaving them away from the obligatory heirs. If the Court accepts the law of Paraguay it must accept it as a whole. No case of election arises.

Northcote, for the daughter This defendant adopts the preceding argument. In the cases cited in Dicey's Conflict of Laws the question arose from some infirmity of the instrument employed, and not from incapacity in the testator. Here it is a case of incapacity. The attempted disposition fails, not for lack of the observance of some ceremony or formality, but owing to positive law. *Hearle* v. *Greenbank* (4) is explained in *Boughton* v. *Boughton* (5) as having depended on incapacity. In the case of incapacity the heir is not bound to elect: *Dundas* v. *Dundas.* (6)

H. E. Wright, for Campbell Patrick Ogilvie. The principle of election is compensation. The interest given by the testatrix to this defendant is indeterminate—does not exist. He cannot be called upon to make compensation out of what does not exist. This defendant adopts the arguments already adduced that no election arises in the case of incapacity.

W. E. Vernon, for Gordon Albinus Ogilvie.

H. Terrell, K.C., in reply. It is not recognized by those who contend against election that all the Court is doing in this case is administering the English estate of a testatrix who had realty in Paraguay and was domiciled in England. To that case English law must apply. In the cases cited against election the Court was dealing with property which by the lex fori the testator could not dispose of. Here, on the contrary, the Court is dealing with a

(1) [1905] 1 Ch. 191.
(2) [1905] 1 Ch. 256.
(3) [1910] 1 Ch. 1.
(4) (1749) 1 Ves. Sen. 298, 306; 3 Atk. 695, 714.
(5) (1750) 2 Ves. Sen. 12, 14.
(6) (1830) 2 Dow & Cl. 349.

disposition which would be perfectly valid by English law. This case cannot be distinguished from that of an English testator having realty in Scotland. The general principle of election is that a person cannot claim both under and against a will; if he claims under it, he must give effect to the whole of it.

[YOUNGER J. Is not the Court bound to give effect to the positive Paraguayan law, just as it would to English positive law if the real estate were situate in England?]

The lex fori alone has, in the case of a domiciled English testator, to be considered, and here by the lex fori, the law of England, the gift to charity is good. *Hearle* v. *Greenbank* (1) was a case of invalidity by the lex fori, and in that case no election arises. *Brodie* v. *Barry* (2) and *Dundas* v. *Dundas* (3) recognize the rule applicable to the present case. When the issue who take four fifths of the realty by Paraguayan law come to this Court which is administering the personalty and ask for some of it, this Court will tell them they must elect or make compensation. *Thornton* v. *Curling* (4) is the converse case. The lex fori, which is the lex domicilii, is the only one to consider. All the cases pointing the same way are collected in Dicey's Conflict of Laws. Mere invalidity by the lex situs and not by the lex fori, when a claimant comes to these Courts, will not prevent the doctrine of election from applying.

[YOUNGER J. The only real question is whether there is any distinction between absolute and relative invalidity—the one total invalidity, the other invalidity for lack of compliance with formality. It is apparently a novel question.]

[Westlake's Private International Law, 5th ed. pp. 155 et seq., ss. 121, 122, 125, was mentioned.]

Cur. adv. vult.

March 1. YOUNGER J. (after stating the facts). It seems clear, in the first place, that the testatrix' son Gordon, as one of the Paraguayan obligatory heirs for whom no other provision is made by the will, is left free by the law of this country to take what the law of Paraguay gives him. Accordingly, one seventh of four fifths of the undisposed-of proceeds of the undertaking falls to him. The real

(1) 1 Ves. Sen. 298; 3 Atk. 695.
(2) (1813) 2 V. & B. 127.
(3) 2 Dow & Cl. 349.
(4) (1824) 8 Sim. 310.

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question is whether those of the obligatory heirs who take other benefits under the will can be allowed at the same time to gain by the partial invalidity in Paraguay of Mrs. Ogilvie's disposition of the tramway undertaking, or whether they must be put to their election either to treat the whole will as valid or, in case they find it to their interest in any instance to take advantage of its invalidity in Paraguay, to submit to make compensation, out of the other benefits given them by the will, to the charities ultimately disappointed by their refusal to allow the provision made for charity to have full effect.

In the main the authorities on this subject are clear. The testatrix here very plainly intended to deal by her will with her Paraguayan property as well as with her English movable and immovable estate. She purported to dispose of her Paraguayan property by express words of gift. There is, therefore, no room here for the difficulty which, although ultimately solved in the same sense, arose in the case of *Orrell* v. *Orrell.* (1) Again, in these cases of election the Court has always shown a special tenderness to the heir-at-law of English real estate as contrasted with the customary heir or the person compendiously described—*pace* Joyce J. in *In re de Virte* (2)—as the "foreign heir." The principle is well established that, where a testator who dies domiciled in England makes a will which purports to dispose of, but is, in fact, inoperative to pass English real estate, his heir-at-law, as contrasted with the customary heir or the foreign heir in the corresponding case, is not put to his election between that realty and other benefits given him by the will—*Hearle* v. *Greenbank* (3)—unless there be contained in the will itself some such express condition, as, for instance, was found in *Boughton* v. *Boughton* (4), that if any who receive benefit by the will shall dispute any part of it they shall forfeit all claim under it.

This distinction between the English heir-at-law and any other heir is not very satisfactory, but, although frequently severely criticized, it was too well established, even in the time of Sir William Grant, to remain open to effective discussion. In *Brodie* v. *Barry* (5)

(1) L. R. 6 Ch. 302.
(2) [1915] 1 Ch. 920, 926.
(3) 1 Ves. Sen. 298.
(4) 2 Ves. Sen. 12.
(5) 2 V. & B. 127, 129, 133.

Sir William Grant deals with the point. He says: "If it were now necessary to discuss the principles, upon which the doctrine of election depends, it might be difficult to reconcile to those principles, or to each other, some of the decisions, which have taken place on this subject. I do not understand, why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate, annexed to a gift of personal property; as it is admitted it must be read, when such condition is expressly annexed to such gift. For, if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same, as if it were expressed in words. And then, if it be rightly decided, that a will, defectively executed, is not to be read against the freehold heir, I have been sometimes inclined to doubt, whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate, as a will, defectively executed, is for the conveyance of freehold estate. It is true however, that a Court of Equity does for certain specified purposes look at a will of copyhold estate to discover the intention; and will supply the want of a surrender in order to effectuate the intention so discovered; but has never attempted to supply the want of the statutory formalities in the execution of a will of freehold estate. We cannot therefore reason conclusively from the one case to the other. But, whatever may be the foundation of the distinction, it is established; and what is now to be considered is, whether it be applicable to the decision of the case now before the Court. This is, or is not, a case of election according as the English will is, or is not, to be read against the Scotch heir. Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine, what portion of each law is to enter into the decision of the question. It is not easy to say, how much is to be considered as depending on the law of real property; which must be taken from the country, where the land lies; and how much upon the law of personal property; which must be taken from the country of the domicil; and to blend both together; so as to form a rule, applicable to the mixed question, which neither

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law separately furnishes sufficient materials to decide." Then, after a discussion as to whether the law of England or the law of Scotland ought to determine the question in the case before him, and finding it unnecessary in that case to decide it, the result being the same under both, he proceeds: "As to the law of England"—and this is the point—"a will of land in Scotland must be held analogous to that of copyhold estate in England; and the will is equally to be read against the heir." And it is now, I think, clearly established that this is by the law of England always so if the realty in question is situate not in England, but, say, in Paraguay or in any other foreign country, and it is by the law of Paraguay or that country, and not by the law of England, that the devise of it fails to have effect. In such a case the Paraguayan or other foreign heir, to whom, say, a pecuniary legacy is given by the will, is put to his election here in England, whether the will does or does not contain any such express condition, as that found in *Boughton* v. *Boughton*. (1)

Further, it has since Sir William Grant's time become, I think, well settled, in accordance with what was plainly his own view, that the question whether in any particular case, like *Brodie* v. *Barry* (2) or like the present, a case of election is or is not raised depends upon the domicil of the testator at death—for it is the law of that domicil which governs it. The reasons for this are given by Lord Brougham in his judgment in *Dundas* v. *Dundas*. (3) In that case a testator domiciled in Scotland had, by a will inoperative under the Statute of Frauds, purported to devise his English real estate to a stranger and had, by his same will, given benefits to his English heir-at-law. The Court of Session held that the heir-at-law was put to his election. The House of Lords affirmed that decision. Lord Brougham there said (4): "The principles of the English law on questions of this kind have been settled in the clearest and most satisfactory manner. The principle was not only stated in *Brodie* v. *Barry* (2), but had been laid down long before by Lord Hardwicke in *Hearle* v. *Greenbank* (5), although since that time Lord Kenyon and Lord Eldon, and Sir William

(1) 2 Ves. Sen. 12.
(2) 2 V. & B. 127.
(3) 2 Dow & Cl. 349.
(4) Ibid. 374.
(5) 3 Atk. 695; 1 Ves. Sen. 298.

Grant, appeared to think that the distinction was not so clearly founded on sense and equity as might be desirable. A note of the case of *Carey* v. *Askew* (1), decided by Lord Kenyon, was furnished by Sir S. Romilly, which has been published by Mr. Cox, the Master in Chancery, in vol. i. of his Reports (2); and there the distinction was taken by Lord Kenyon, that when a will was ill executed for its purpose of disinheriting the heir, or putting him to his election, it was a question whether the devise might not be looked at as a condition annexed to the bequest of the personalty to the heir; whether there was not this exception to the rule, that the devise might be let in as a condition annexed for forfeiting the legacy, so that you might say that this formed a case of election. This was what they held as binding on them, as the distinction had been settled. Lord Kenyon said that it might have been better if so thin and shadowy a distinction had not prevailed; but finding it established, they said that they had only to administer the law as they found it. Now in this case there is no express condition; and it more resembles the case of *Cunningham* v. *Gainer* (3), the only description of case considered by the Scotch Court. If this decision should stand, it will not decide that the Scotch Court had any power to set aside the Statute of Frauds as to the conveyance to an English estate, any more than Lord Kenyon's judgment in *Carey* v. *Askew*. (4) A will not duly executed according to the Statute of Frauds cannot be read against the heir in an ejectment, although that which will substantially have the same effect may be done in equity. The Court of Equity says, 'We do not pretend to any power to dispense with the provisions of the Statute of Frauds in the conveyance of real property, but are dealing with personal property; and on looking at the will to ascertain how the personal property is disposed of, we find there that a legacy is given to you on a certain condition, and we say that you shall not have that legacy unless you perform the condition.' That is what the Court of Chancery has done, and it appears to me that the Court of Session in this instance has done no more. 'You come to us,' they say, 'not as heir to real property over which we

(1) (1786) 2 Bro. C. C. 58; 8 Ves. 492; 1 Cox, 241.
(2) 1 Cox, 241.
(3) (1758) Mor. 617.
(4) 2 Bro. C. C. 58.

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have no power, but as a legatee of personal property over which we have power, and as you claim the legacy under the will, we say that you shall take according to the whole of the will as it stands, or you must reject it altogether.' I do not put this as the same case as that of *Carey* v. *Askew* (1), because there the condition was express, and here it is only implied; and then the question comes to be, What is the law of Scotland with reference to the conditions; and they say, 'We take the whole of the instrument together, and find that it is a Scotch deed, and we construe it according to the principles of the Scotch law, and not according to those of the English law, and we collect from the whole, that the intention of the maker of the deed was, that the whole of his property should be turned into personalty, and equally divided. You may reject this, and refuse to bring in the English real property, over which we have no power; but we have power over the personal property, and unless you comply with the intent of the maker of the instrument, as expressed in it, you shall take nothing as legatee.' I am not prepared to say that the Scotch Court has not the power to say so, and that too whether the condition be express or implied." And although the House of Lords in dealing with a Scotch appeal applies to it the principles of Scotch law applicable, *Orrell* v. *Orrell* (2), to cite no other case, shows that in this respect the principles of the law of England are the same.

The result at first sight may seem strange. It would appear remarkable that the question whether the English heir of a Scottish testator resident in England at his death is or is not put to his election under his will may, in fact, turn upon the question whether the testator had or had not then lost his domicil of origin—a question which many testators in that situation might themselves find it difficult to answer. But the point is one of substance, and I am inclined to think that it discloses the clue by which the difficulty in the present case may be solved. If by the law of the domicil the gift of the tramway be, irrespective of its locality, to any extent invalid, there is no case of election; if it is only by the law of lex rei sitae that the gift is inoperative, then the foreign heirs are put to their election.

(1) 2 Bro. C. C. 58. (2) L. R. 6 Ch. 302.

And the foreign heirs, in argument, ultimately accepted that position. But they said that by the law of England a foreign heir would not be put to his election in a case like the present, where the invalidity of the gift by the law of Paraguay was not due to any such formal matter as, for instance, a defect in signature or attestation, but was due to its being contrary to a cardinal principle of public policy adopted in Paraguay, the country where the property is situated. Cases like *Orrell* v. *Orrell* (1), *Brodie* v. *Barry* (2), and *Dundas* v. *Dundas* (3), where the foreign heir was put to his election, were all of them, they pointed out, cases in which the devise of the foreign realty might have been effectively made if it had been made in due form; here, on the other hand, the devise of the tramway undertaking to charity could not to the extent of four fifths of the property be, by the law of Paraguay, made valid by any means whatever. To such a case, so it was said, this Court must apply the principles of *In re Oliver's Settlement* (4) and *In re Beales' Settlement* (5), approved by the Court of Appeal in *In re Nash* (6), and refuse to assist indirectly, by an application of the doctrine of election, a breach or evasion of positive rules of foreign law, just as in these cases it refused to, shall I say, encourage, by applying the doctrine, a breach of the rule against perpetuities. The argument is plausible, but, in my opinion, it is not sound. It is not open to me to consider the correctness of the principle as applied to the rule against perpetuities upon which *In re Oliver's Settlement* (4) and the cases following it proceed. That principle has been accepted by the Court of Appeal and is binding upon me. Some day it may come under the notice of the House of Lords, and then the powerful reasoning of Mr. Theobald in the preface to the 7th edition of his Law of Wills and the views of the learned editors of Jarman on Wills, 6th ed. p. 851, may meet with more consideration than they have hitherto received, and even *In re Bradshaw* (7) may, as a decision, at the last come to its own, and the question may be asked whether any advantage is gained by driving testators, if they would attain the same end, to resort in that matter to the

(1) L. R. 6 Ch. 302.
(2) 2 V. & B. 127.
(3) 2 Dow & Cl. 349.
(4) [1905] 1 Ch. 191.
(5) [1905] 1 Ch. 256.
(6) [1910] 1 Ch. 1.
(7) [1902] 1 Ch. 436.

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use of an express condition, the necessity for which, in cases then already established, was so deplored by Sir William Grant in *Brodie* v. *Barry*. (1) Accepting, however, as I must, the principle to the full, it does not, I think, apply here.

This Court does not, in these cases of election, against a foreign heir, presume to sit in judgment upon the wisdom or the reverse according to its own notions of the municipal law of any foreign country. If it finds that an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, and has, in fact, so far as words are concerned, effectually so disposed of it, this Court merely says that it is against conscience that that foreign heir, given a legacy by the same will, and to that extent an object of mere bounty on the part of the testator, shall take and keep, under the protection of the foreign law, the land by the will destined for another, without making to that other out of his English legacy, so far as it will go, compensation for his disappointment, thus effectuating the testator's whole intentions. That object, as I take it, is, in the eye of this Court, always the paramount object of attainment. But in so attaining it the Court violates no foreign law; it leaves that law, as it must, untouched. If the heir can obtain under the protection of the foreign law property which the testator destined for others, he will, so far as this Court is concerned, be at perfect liberty to take it and keep it; it is the legacy subject to its own jurisdiction that the Court alone will touch and administer and, if necessary, impound for the purpose of effectuating the testator's intention, and so doing justice as it sees it. And, in my opinion, the Court will always take this course upon the conditions presupposed, unless the heir's legacy would, if applied in compensating the disappointed devisees of the foreign land, be applied in a way or for purposes for which the testator himself could not, by English law, validly by his will have directed that legacy to be so applied. It is with the English law only that the Court at this stage is concerned. If, in the result, no principle of that law is violated, the hand of the Court will not be stayed. The foreign heir will be put to his election; and compensation, partial or complete, will, if necessary, be provided for the disappointed devisee. From this point of

(1) 2 V. & B. 127.

view the question what precise principle or provision of the foreign law, as such, has been left unobserved by the testator becomes quite immaterial in this Court, and I cannot doubt that it is for this reason that no such distinction as that suggested in argument here has, so far as I can find, ever before been taken.

In my opinion these Paraguayan heirs are in this case put to their election.

Solicitors: *Heywood & Ram; Treasury Solicitor; Slaughter & May; Austin & Austin; Field, Roscoe & Co.; Ashurst, Morris, Crisp & Co.*

A. L.

In re HOLLINS.
HOLLINS *v.* HOLLINS.

[1917 H. 756.]

C. A.
1917
ASTBURY J.
Nov. 7, 8.
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1918
March 14, 15.

Legacies—Abatement—Capital Sum to produce 1000l. a Year after deducting Income Tax—Mode of ascertaining Capital Sum—Basis of Investment—Consols—Four per Cent. War Loan (Income Tax Compounded).

Bequest in trust for contingent legatees of a capital sum sufficient at the time of appropriation to produce 1000*l.* a year after deduction of income tax. The estate being insufficient for payment in full of this and other legacies:—

Held, that for the purpose of abatement the capital sum required to satisfy the contingent legacy must be ascertained on the basis of an investment in Consols.

The rule settled by *Prendergast* v. *Lushington* (1846) 5 Hare, 171, affirmed sub nom. *Prendergast* v. *Prendergast* (1850) 3 H. L. C. 195, applied.

Decision of Astbury J. reversed.

ORIGINATING SUMMONS.

By her will, dated October 7, 1914, the testatrix, after appointing the plaintiffs her executors and trustees and giving certain specific and pecuniary legacies free of duty, gave (clause 11) free of duty to her trustees "such a capital sum as will by the annual income thereof at the time of appropriation or investment produce after

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deduction of income tax a yearly income of 1000*l.*" upon trust for her niece Dorothea on attaining the age of twenty-five, and if she should not attain a vested interest, upon trust for other contingent legatees.

After bequeathing certain life annuities free of duty and authorizing her trustees to appropriate investments in full discharge thereof, the testatrix (clause 14) devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, the net proceeds, after paying funeral and testamentary expenses, death duties and debts, and paying or providing for the legacies and annuities, to be held upon trust for the Women's Labour League and the Labour party in equal shares.

Clause 21 authorized investments in "any stocks funds or securities for the time being authorized by law for the investment of trust funds," and in a very wide range of other securities. Clause 22 authorized the trustees to appropriate any part of the estate in or towards satisfaction of any share, with power conclusively to determine the value of any part of the estate for that purpose. Clause 23 empowered the trustees in their absolute discretion conclusively to determine questions and matters of doubt arising in the execution of the trusts.

The testatrix died on February 25, 1916. Her net estate, after payment of debts and estate duty, was insufficient to provide for the legacies and annuities in full, and the question arose (inter alia) on what basis the capital sum necessary to produce 1000*l.* a year free of income tax was to be ascertained for the purpose of abatement—i.e., whether on the basis of an investment in Consols, 5 per cent. War Loan, 4 per cent. War Loan (Income Tax Compounded), or how otherwise.

On the basis of Consols at 55 the amount necessary to provide 1333*l.* 6*s.* 8*d.* a year gross, or 1000*l.* a year net after deducting 5*s.* income tax, was 29,333*l.* 6*s.* 8*d.*, whereas the same net income could be obtained by investing 25,000*l.* in 4 per cent. War Loan (Income Tax Compounded).

The trustees proposed to adopt the Consols basis, but on the remonstrance of some of the beneficiaries they surrendered their discretion to the Court and issued this summons on May 4, 1917, to determine (inter alia) the above point.

The summons was heard before Astbury J. on November 7, 8, 1917.

Sheldon, for the trustees.

G. R. Northcote, for Dorothea, now aged twelve. The amount of the capital sum required to produce 1000*l.* a year free of income tax must be ascertained on the basis of an investment in Consols: *Prendergast* v. *Lushington* (1), affirmed sub nom. *Prendergast* v. *Prendergast* (2), and recognized in Seton on Judgments, 7th ed. pp. 1562, 1574.

[ASTBURY J. In that case the choice lay between investing in Consols, the one main Government security, or retaining foreign investments. Here there is a very wide investment clause.]

Having regard to the power of retainer, that was practically so in *Prendergast* v. *Lushington*. (1) In the present case, if the trustees had adopted the Consols basis and invested the ascertained amount in Consols, no one could have complained. Consols are still the premier security, absolutely safe, and practically perpetual. In applying the rule in *Howe* v. *Earl of Dartmouth* (3) "Consols have been taken as the standard because they are regarded as absolutely safe; and the rule is therefore still the same notwithstanding the reduced rate of interest of the new Consols, and the increased range of authorized securities": Gover on Capital and Income, 2nd ed. p. 140; *In re Duckworth*. (4) It would therefore be wrong to ascertain the amount on the basis of an investment in short terminable securities like the War Loans. The question is not what securities the Court might direct an ascertained sum to be invested in, but what is the correct standard security for the purposes of calculation.

Gerard M. Hildyard, for a pecuniary legatee. There are many Government securities now available for the investment of funds in Court (Order XXII., r. 17), and the old rule binding the Court to invest in Consols is no longer applicable: Daniell's Chancery Practice, 8th ed. p. 1564. Four per cent. War Loan (Income Tax Compounded) is as safe as Consols, and in the circumstances it should be taken as the basis of investment.

Owen Thompson, for the Women's Labour League, and *Hon.*

(1) 5 Hare, 171.
(2) 3 H. L. C. 195, 212, n., 223.
(3) (1802) 7 Ves. 137a.
(4) (1891) 35 Sol. J. 561.

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Frank Russell, K.C., and *Slesser*, for the Labour party, adopted the same argument.

Fairfax Luxmoore, for other parties.

ASTBURY J. (after stating the facts). The trusts of the capital sum bequeathed by clause 11 are still contingent and the persons entitled thereto cannot at present be definitely ascertained. The residue is really non-existent. The legacies and annuities, including this capital sum when ascertained, will have to abate rateably, and the question is what investment should be adopted for the purpose of ascertaining the capital sum referred to in clause 11 which will produce 1000*l.* a year after deduction of income tax, and whether there is any hard and fast rule that the investment must be in Consols.

In *Prendergast* v. *Lushington* (1), relied upon by Dorothea and other contingent legatees of the capital sum, the testator bequeathed to his trustees so much of his personal estate and effects as at the time of his decease would produce an annual income of 1500*l.* to be held upon trust for his widow during widowhood, and afterwards to fall into residue. He directed that the same should be selected, appropriated, and set apart as soon as conveniently might be after his decease; and he declared that it should be lawful for his trustees to permit the whole or any part of his personal estate to remain and continue on such securities as the same might be invested in at the time of his decease. Now as a matter of fact the whole of this testator's estate was at the date of his death invested in foreign securities. (2) The testator then proceeded to authorize and empower his trustees, notwithstanding the direction previously contained, to sell and convert such parts of his personal estate as they should be minded and to invest the same in the public stocks or funds of Great Britain, or on Government or real securities. It was contended that the net result of this will was that an appropriation should be made of the then existing foreign securities as distinct from a sale and reinvestment. Wigram V.-C., in the absence of an arrangement between the parties, which he seemed to desire, held (3) "that,—however the case might have been if the trustees had acted upon their own responsibility,—the Court would only execute

(1) 5 Hare, 171. (2) 5 Hare, 174; 3 H. L. C. 202. (3) 5 Hare, 176.

the trusts of the will by directing the sale, and investment in Consols, of a sufficient part of the trust property to provide for the annuity to the widow."

That case went on appeal to Lord Cottenham L.C., and in affirming the Vice-Chancellor's decision he said (1): "Then comes the question, what is the rule of the Court as applicable to a case of this sort, where the funds are to be appropriated out of the general estate, for answering a particular purpose, for providing first for the widow for life, the principal being afterwards to fall into the residue? There is but one rule; the Court will not exercise its discretion as to whether it will invest in one stock or another, or whether one stock is better than another; there is but one rule, and that is a rule established for the better protection of all parties interested, namely, an investment of the funds in the three per cents., which the testator at all events contemplated as possible, and as to which he gave the trustees a discretion, which, the trustees having declined to exercise, the Court is called upon to exercise."

In the House of Lords Lord Brougham said practically the same thing (2): "Here the Court can exercise no discretion as to the investment of the property in one stock rather than in another. The rule of the Court is to invest in the three per cents. I agree with Lord Cottenham in holding that the testator, at all events, contemplated this as possible; indeed the rule of the Court so established must be regarded as known to all, and all must be understood to be aware that if trustees whom they appoint shall decline to act, the Court, acting, will follow its known rule. In this case the testator gave the trustees a discretion, which they declined to exercise; and it has devolved on the Court, which has no choice as to the mode and manner of executing it, as regards the premises."

Since the date of this decision the practice as to investing in Consols has been widely altered. Under the present rules of Court cash under the control of or subject to the order of the Court may be invested in a large variety of investments which appear in Order XXII., r. 17. Instead of there being now one main Government security, the war has resulted in a number of Government loans and the Court has for some time past regularly directed moneys under its control to be invested in these various War Loans, although

(1) 3 H. L. C. 212, n. (2) 3 H. L. C. 223.

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formerly the practice was to direct the investments of such funds in Consols. It is contended that what the Court does and is authorized to do with regard to moneys actually paid into Court cannot be done for the purpose of ascertaining the amount of this capital sum. The matter is one of extreme importance as to whether the Court ought in a case like the present to exercise a different method of procedure, or a different degree of care as to investment, from that which it adopts and follows with regard to the investment of sums committed to its care. Further, in this case there is a very wide range of investment authorized by the testatrix. It is quite true, as stated by Lord Brougham, that the Court, when such an investment clause comes before it, is not in the habit of picking and choosing between Government and other securities, but there is now no rule that compels the Court, having decided to invest the money or to direct its investment in Government securities, to say that these shall be confined to Consols.

Under the present will there are a large number of persons interested in pecuniary legacies, all of whom, including the legatees of the capital sum in question, will have to suffer abatement, and I think it is the duty of the Court, the question having been submitted to it, to see that the intentions of this testatrix are carried out in their entirety as far as possible by not increasing the deficiency more than is necessary for the purpose of absolute security of the persons interested in the capital sum. I think myself (and I have consulted one of my learned brethren on the subject) that I shall be following the rule laid down in *Prendergast* v. *Lushington* (1) if I direct that the capital sum be ascertained and invested in Government securities, and I think the fair thing to do in the present circumstances, as it has been left to me, is to direct that this sum shall be ascertained on the basis of an investment in the 4 per cent. War Loan (Income Tax Compounded) and invested accordingly, the result of which will be that the deficiency which would be created if the capital sum were ascertained on the basis of an investment in Consols will be substantially reduced without endangering the interest of the persons who may ultimately become entitled to the sum in question.

G. R. A.

(1) 5 Hare, 171.

From this decision the defendant Dorothea Hollins appealed.

The appeal was heard on March 14 and 15, 1918.

Jenkins, K.C., and *G. R. Northcote*, for the appellant. This is not a gift of an annuity, but of such a capital sum as will produce 1000*l.* a year. The submission is that the rule of the Court in ascertaining the amount of a capital sum of this kind is to take as the basis of calculation an investment in Consols. The Court does not select as between Consols and other Government securities. Astbury J. has wrongly taken as the basis an investment in 4 per cent. War Loan, a security which cannot appreciate, and he seems to have chosen that particular stock on the ground that the result will be more beneficial to the other legatees. He was wrong in taking that into consideration. The rule is well established: *Prendergast* v. *Lushington*. (1) At the date of that case there were eleven different Government securities: see Bythewood and Jarman's Conveyancing Precedents (1849 ed.), vol. xi. p. 457, where a list of them is given.

The question in this case has nothing to do with the range of investment which is authorized for cash in the control of the Court. Different considerations arise here. *Prendergast* v. *Lushington* (1) has always been treated as laying down the rule: Seton on Judgments, 5th ed. vol. ii. p. 1371. The Court has had a wide discretion as to the investment of cash in its hands, at all events since 1861. That power has never yet been considered as giving any assistance in ascertaining the amount of a capital sum to be invested in such a case as the present. The rule was applied in *Brown* v. *Gellatly*. (2)

[EVE J. referred to *Hicks* v. *Ross*. (3)]

The trustees having declined to exercise their discretion, the rule of the Court is not to choose between a mass of investments, but to take as the basis for ascertaining the amount of the capital sum the most permanent Government security, namely, Consols. The annuity is simply the gauge by which the amount of the capital sum is to be ascertained. [*In re Duckworth* (4), *In re Marsh* (5), and *Hill* v. *Rattey* (6) were also referred to.]

Hon. Frank Russell, K.C., and *Owen Thompson*, for the Women's

(1) 5 Hare, 171.
(2) (1867) L. R. 2 Ch. 751.
(3) [1891] 3 Ch. 499.
(4) 35 Sol. J. 561.
(5) [1917] W. N. 373.
(6) (1862) 2 J. & H. 634, 646.

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Labour League. The duty of the trustees in exercising their discretion would be to take the course which would most nearly carry out the intention of the testatrix to benefit all her legatees. By investing in the War Loan the amount required to satisfy the appellant's legacy would be less than if Consols were taken as the basis, and the estate being insufficient to pay all in full there would be a smaller abatement. Why should the Court go out of its way to increase the appellant's benefit at the expense of the other legatees? There is no hard and fast rule in such cases: *Hill* v. *Rattey*. (1) In *Prendergast* v. *Lushington* (2) it is only put as a rule of administration. The rule suggested must yield to modification from time to time. The Court will act as a prudent trustee and give the appellant what the testatrix intended her to have, namely, an amount which, if invested in Government security, will produce 1000*l*. a year. That is the effect of the order appealed from, and is the proper course to take. The trustees might very properly have done that themselves, and no one could have objected.

Gerard M. Hildyard, for a pecuniary legatee. This is not the case of a gift of an annuity. The element of permanency only applies to that case. The question here is merely as to the measure of the amount of a legacy. It is the duty of the trustees, and therefore of the Court, in such a case to adopt a basis of calculation which will diminish the extent of the abatement of all the legacies.

Slesser, for the residuary legatees.

Fairfax Luxmoore, for other parties.

Sheldon, for the trustees.

SWINFEN EADY L.J. (after stating the facts). The position taken up by the trustees is this—that, having regard to the attitude adopted by some of the legatees, they were not desirous of exercising any discretion vested in them by the will. They left it to the Court to say what under the circumstances ought to be done with regard to determining the amount of this capital legacy. The learned judge has determined, by the order made upon the originating summons dated May 4, 1917, "that, upon the true construction of the said will and in the events which happened, the plaintiffs ought forthwith to invest in 4 per cent. War Loan,

(1) 2 J. & H. 634, 646. (2) 5 Hare, 171.

1929-1942 (Income Tax Compounded), such a capital sum as will by its annual income produce at the time of such investment a yearly sum of 1000*l.*" The form of the order was perhaps induced by the form of the summons, which refers to investment. But the point to be determined is not the mode in which any legacy was to be invested. The point to be determined is how the amount of the capital given by this legacy is to be determined. The learned judge in his judgment, after directing this investment at 4 per cent., put it in this way. He says: "It is contended that what the Court does and is authorized to do with regard to moneys actually paid into Court cannot be done with regard to a direction of investment by trustees in such a case as the present. (1) The matter is one of extreme importance as to whether the Court ought in a case like the present to exercise a different method of procedure, or a different degree of care as to the investment, from that which it adopts and follows with regard to the investment of sums committed to its care"; that is to say, with regard to sums under the control of the Court. In my opinion that is altogether an erroneous way of regarding the question which has to be determined here. It has nothing to do with the different modes of investing cash under the control of the Court. The point for decision is how the amount of the capital sum which is given as a contingent legacy to Dorothea is to be determined. She is to have such a capital sum as will by the annual income thereof at the time of the appropriation yield the yearly income of 1000*l.* How is that sum to be ascertained?

In my opinion the rule of this Court is settled, and has long been settled, and, if not before, it was certainly settled by *Prendergast* v. *Lushington* (2), which in its facts is indistinguishable from the present case. In that case there was a gift in these words: "I give and bequeath to my trustees hereinafter named so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1500*l.*" It is to be observed that there was no gift of an annuity. The trustees were given a capital sum, and it was to be ascertained in the manner directed by the will. It was to be so much of the estate and effects as at

(1) It will be seen that the wording of the judgment as revised by the learned judge and reported ante, p. 508, is rather different.—F. P.

(2) 5 Hare, 171, 176.

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the time of the testator's decease should produce the clear annual income of 1500*l.* That was the description of the gift. Then the fund so arrived at was to be invested, the annual income paid to the widow for life, and upon her death the fund was to fall back into residue and become divisible between the testator's children. So the widow had only an interest for life; she did not take an annuity. The will in terms provided that after the investment, if the income had either increased or decreased as the case might be, she was to have the income of the fund, such as it was, and then on her death the fund was to go back into residue. Now the point of the case was whether the capital bequest was only to be satisfied by selecting an appropriate portion of the investments of which the testator was possessed at the time of his death (they are fully set out in the report), and it was said that the Court had no power to convert or to direct the conversion of those investments with a view of ascertaining the capital sum to be provided, or to refer to any other mode of investment as a measure of ascertaining the capital sum. It was insisted that the sum must be provided out of the investments subsisting at the time of the testator's death, and that there was only a power to appropriate. There was some foundation for that argument in the language of the will, but it did not prevail after that argument had been disposed of. Wigram V.-C. dealt with the case in this way: "However the case might have been if the trustees had acted upon their own responsibility, the Court would only execute the trusts of the will by directing the sale, and investment in Consols, of a sufficient part of the trust property to provide for the annuity to the widow." So that the amount of the capital sum to be set aside was to be ascertained by reference to the amount of money necessary to buy Consols to produce the given income. Now, the Vice-Chancellor having so decided, the case went before Lord Cottenham, when he affirmed the decision of the Vice-Chancellor, and then, under the circumstances mentioned in the report, there was a further rehearing before the Lord Chancellor. It was again argued, and he again affirmed his previous decision and that of the Vice-Chancellor. After that the case was taken to the House of Lords, and as reported (1) there is a slip in the head-note, because it refers

(1) 3 H. L. C. 195, 218, 222, 223.

to the gift as an annuity, which it was not strictly. Lord Brougham said this: "The question arising in this case is of importance, from accidental circumstances, to the parties; and it is also important to the law as administered in Courts of Equity"; and then he entertains no doubt. He says: "First of all, let me state the principle which the concurrent authorities of the case, and the known course of proceedings in our Courts of Equity have established. If a person leaves the disposition of his property after his decease to trustees, and, they declining or neglecting to act, the aid of the Court is required, the Court will not, as a matter of course, exercise the discretion with which the trustees were invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding." Then he considers the authorities, and he says: "I take it then to be quite clear that the discretion was vested in the trustees. It is equally certain that they declined to exercise that discretion." Then he says: "Now how is the Court to act? . . . . Here the Court can exercise no discretion as to the investment of the property in one stock rather than in another. The rule of the Court is to invest in the Three per Cents. I agree with Lord Cottenham in holding that the testator, at all events, contemplated this as possible; indeed the rule of the Court so established must be regarded as known to all, and all must be understood to be aware that if trustees whom they appoint shall decline to act, the Court, acting, will follow its known rule. In this case the testator gave the trustees a discretion, which they declined to exercise; and it has devolved on the Court, which has no choice as to the mode and manner of executing it, as regards the premises." Now, applying that to the present case, whatever discretion there was vested in the trustees by the will the trustees declined to exercise it, and therefore there is no question before us as to whether the trustees, in the exercise of any discretion vested in them, could or could not have appropriated this 4 per cent. War Stock; no such question arises before us. That being so, what is the established rule of the Court now in arriving at the capital sum? I am of opinion that the established rule is this: The Court selects, as the basis for ascertaining the amount of capital money bequeathed by the will, that Government security which is the most permanent

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and the least likely to be redeemed, and that is Consols. What the learned judge here has done is, he has measured the amount given to the legatee by reference to a stock which is at present about par, and which is redeemable at par, or liable to be redeemed at par, at a date before this legatee can attain a vested interest under the will. She having been born in the year 1905, and the legacy vesting on her attaining twenty-five, it would not vest before the year 1930, and this 4 per cent. War Loan is liable to be redeemed in the year 1929. In my opinion, that is not the proper measure or proper rule to apply.

Under these circumstances I am of opinion that the learned judge, in measuring the extent of the legacy by the amount required to buy 4 per cent. War Loan Stock to produce the yearly income in question, has departed from the settled and known rule of the Court, and that rule exists to-day as when *Prendergast* v. *Lushington* (1) was decided in 1850 (I think it first of all came before the Courts in 1840 and then was heard in various stages until it was finally disposed of by the House of Lords in 1850), and the legatee here is entitled to have the capital sum ascertained by reference to the sum of money required to purchase Consols to produce, after deduction of income tax at the rate current at the time of appropriation, a yearly income of 1000*l.*

For these reasons I am of opinion that the appeal must be allowed. No question arises on this appeal as to the security in or upon which the capital so ascertained is to be invested.

BANKES L.J. I agree; and what has influenced my judgment more than anything else is the fact that the investment which has been selected by the learned judge is one which may be redeemed in 1929 and must be redeemed in 1942.

EVE J. With all respect to the learned judge, I cannot help thinking that the true nature of the question in the summons which he was called upon to decide was obscured by the introduction of extraneous and irrelevant considerations. I cannot appreciate how the answer to the question of construction arising on this will depends in any way on the practice of the Court with reference to

(1) 5 Hare, 171.

the investment of money under its control, and it is in my view a misapprehension to treat this as a case wherein the Court is called upon to determine any mode of investment or to exercise any jurisdiction involving, or calculated to bring about, a different method of procedure, or a different degree of care as to investment, than that which it adopts and follows with regard to the investment of sums committed to its care.

The short point is, how is the quantum of the contingent legacy bequeathed for the benefit of Dorothea to be ascertained, a point which involves one or at most two plain questions: First, has the Court, now that the trustees have definitely refused to exercise the discretion conferred upon them by the will, the same discretion, and, if not, is there any rule on which the Court ought to act in determining the quantum of the legacy?

It has been argued, and I am content to accept the argument as well founded, that the trustees had an absolute and unfettered discretion and could have satisfied the legacy by the appropriation of any part of the estate yielding an income at the date of appropriation of 1000*l.* plus income tax at the rate then current. Is it suggested that the Court has the same absolute and unfettered discretion? I gather that Astbury J. thinks not. He apparently would limit the discretion of the Court to securities upon which moneys under the control of the Court can be invested. Be it so, but the moment it is admitted that the discretion vested in the Court is different from that vested in the trustees, what becomes of the argument that the only operation of the refusal of the trustees to exercise the discretion is to transfer that discretion to the Court? It has not, in my opinion, any such operation, and, if not, the only question which remains is, Can the Court assume to frame for itself a discretion which is not to be found in the will, and for which there is no authority? In other words, is there or is there not any settled rule as to the principles upon which the Court ought to act in ascertaining the quantum of such a legacy as we have here to deal with? I think there is. The case of *Prendergast* v. *Lushington* (1) seems to me to be conclusive on the point. Further, although I fully appreciate that this is not an annuity, a gift of a capital sum sufficient to produce an annual income of a fixed

(1) 5 Hare, 171.

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amount is, in my opinion, so far analogous to a gift of a perpetual annuity of that fixed amount as to make the rule applicable to the redemption of a perpetual annuity a matter to which material consideration can properly be given in determining how the quantum of the capital sum ought to be ascertained. Subject to certain well-known exceptions, the legatee of a perpetual annuity can require to have the capital value paid to him in lieu of receiving the annuity de anno in annum, and it is well-settled practice that the price to be paid for such an annuity is such a sum as at the price of the day will purchase 2½ per cent. Government stock sufficient to produce the annuity, excluding any charge for brokerage : see *Hicks* v. *Ross*. (2) It is true that in that case the annuity was adequately secured, and that in this case we are dealing with an estate said to be insufficient to provide all the annuities and legacies bequeathed by the will. But the only effect of this will be to reduce the sum given to the legatee. It cannot, and ought not to, alter the principle on which her aliquot share of the deficient estate is to be ascertained.

I think the judgment appealed from was wrong, and that in lieu of the first declaration in the order under appeal, a declaration which as it stands does not even give effect to what Astbury J. decided, we ought to declare that the amount of the legacy bequeathed in trust for the defendant Dorothea Hollins contingently on attaining the age of twenty-five years ought to be arrived at by ascertaining what sum invested in 2½ per cent. Consols would at the date of investment produce, after deduction of income tax, an annual income of 1000*l*.

Appeal allowed.

Solicitors : *Field, Roscoe & Co., for Enfield & Son, Nottingham ; Boodle, Hatfield & Co. ; Kenneth Brown, Baker, Baker & Co.*

(1) [1891] 3 Ch. 499.

G. A. S.

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[1917 W. 658.]

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ASTBURY J.
Jan. 21, 22, 23, 24, 25, 28, 29, 30; *Feb.* 6.
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March 19, 21, 26.

Stock Exchange—Re-election of Members—British Subject—Objection—Enemy Birth—Relevance—Discretion of Committee.

Under the Rules of the Stock Exchange members are elected for one year only, and come up annually for re-election under rule 21, which provides that the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant. No member has any vested right to be re-elected, either absolutely or conditionally, upon his fulfilling certain qualifications, or in the absence of any disqualifications. If, upon consideration of all the facts and circumstances relating to an applicant, the committee do not "deem him eligible" for re-election, there is no power vested in any Court to overrule their decision. The question of an annual re-election is wholly different from that of expulsion or suspension during the year for which a person has been duly constituted a member. The committee, in refusing to re-elect a member, are not bound to give their reasons, and if they do give them the question of their sufficiency is not for the Court. If the only objection to the applicant be that he is of enemy birth, and if the committee, in refusing re-election, act on that alone, they will be justified in doing so. A member has no right to be re-elected unless the committee deem him eligible, and that is entirely a question for them. The duty of the committee with regard to re-electing members is an ordinary act of administration involving exercise of discretion, and not a judicial or quasi-judicial act. If the committee act with honesty and good faith, their decision cannot be questioned.

So *held* by the Court of Appeal, affirming the decision of Astbury J.

By rule 35 a member intending to object to the re-election of a member, the admission of a candidate, or the re-admission of a defaulter shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot.

By temporary regulation 2 imposed by the Treasury on the reopening of the Stock Exchange on January 4, 1915, as "absolutely necessary in the national interests" and with the view (inter alia) to "close the market to the enemy both directly and indirectly," the following only will be admitted:—(*a*) British-born members or clerks; (*b*) naturalized members or clerks who have re-exhibited their letters of naturalization to the committee, and, "in the case of naturalized members or clerks of enemy origin," have satisfied

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the committee that they have been denationalized in their country of origin.

By rule 29 (1.) a candidate who has been a foreign subject is ineligible until he has been naturalized for five years and a resident in this country for ten years.

By rule 29 (2.), passed on January 5, 1916, a "candidate" of German, Austrian, or Hungarian birth is ineligible.

In March, 1917, the plaintiff, a naturalized British subject of German birth, who had been a member since 1895 and had fulfilled the conditions of rule 29 (1.) and temporary regulation 2, applied for re-election.

An objection was lodged under rule 35 on the ground of his enemy birth.

At the invitation of the committee the plaintiff showed cause against that objection by letter and at an interview, and, appreciating that the objection might involve some possible apprehension of disloyalty, he stated numerous facts with a view of removing that apprehension.

The committee, however, refused the plaintiff's application because, in the exercise of their discretion under rule 21, they did not deem him eligible for re-election.

The plaintiff brought an action to impugn their decision on the ground that it was arbitrary and based on irrelevant matter, namely, enemy birth:—

Held, that as by rule 29 (2.) enemy birth was an absolute bar to the election of a new candidate, it was, notwithstanding rule 29 (1.) and temporary regulation 2, a relevant matter to be considered in the re-election of an old member, and, as the plaintiff had not established that the committee had not acted honestly according to their lights, the Court could not review their decision.

WITNESS ACTION.

The undertaking called the Stock Exchange, originally constituted under a deed of settlement of March 27, 1802, is now governed by a deed of settlement of December 31, 1875, and rules made thereunder. The undertaking is vested in trustees and managers, who make the rules for its management. The assets consist of the buildings, furniture, and money. The capital is 240,000*l.* nominal value, divided into 20,000 shares on which 12*l.* each is deemed to be paid up. These shares are held by the proprietors, who elect the trustees and managers. The liability is unlimited.

By clause 1 of the deed of settlement "the undertaking" means the undertaking called the Stock Exchange, "the proprietors" means the registered shareholders, and "members" means the

persons from time to time admitted to attend and in their own right to transact business at the Stock Exchange.

By clause 2 the purposes of the undertaking are the maintenance of the buildings, the provision of furniture and accommodation, and the employment of the buildings for buying and selling stocks and shares subject to regulations under or made pursuant to the deed.

By clause 15 the shares are transferable and transmissible only in the manner and subject to the conditions of the deed.

By clause 21 no transfer of a share shall be made to a non-member, and by clause 22 no transfer shall be made to any person not approved by the trustees and managers, who shall have an absolute discretion as to rejecting any transfer, and shall not be bound to give any reason for rejecting it.

By clause 23 the executors or administrators of a deceased proprietor are not entitled to be registered as proprietors, but may transfer the shares, subject to the conditions of the deed.

By clause 24 every proprietor ceasing to be a member and the executors or administrators of a deceased proprietor shall (unless the trustees and managers shall otherwise determine) within two years of cesser or death transfer his shares to some other person, and in default the trustees or managers may purchase or sell them under clause 25.

Clauses 31 to 42 contain provisions as to the election of trustees and managers, and the conveyance of the property to them.

By clause 49 the trustees and managers, subject to the control of a general meeting, but not so as to render invalid any act done by them before the resolution of a general meeting, shall have the management of the property and affairs of the undertaking.

By clause 50 (*a*) the trustees and managers shall appoint secretaries, clerks, &c., and pay their salaries out of the funds of the undertaking. They may also pay thereout a salary to the secretary of the committee for general purposes.

By clause 50 (*k*) they shall fix the entrance fees and annual subscriptions of members, and, subject to the rules and regulations made by the committee for general purposes, shall permit all persons admitted as members by that committee, and who have paid the price of admission so fixed, to attend and transact

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business for one year from March 25 then instant or last preceding the admission.

By clause 50 (*m*) they may make by-laws, rules, and regulations for the better management and conducting the affairs of the undertaking, so that the same do not limit or affect the powers or duties of the committee for general purposes, or any subject specially reserved to that committee, and be not repugnant to the general scope of the deed or any resolution of the proprietors in general meeting. But no by-laws, rules, and regulations shall be made by the trustees and managers under this power respecting the transaction of business on the Stock Exchange or the mode of conducting the same.

By clauses 81 to 87 provision is made for the declaration and payment of dividends to the proprietors out of the net profits of the undertaking.

By clause 90 the members are on March 20 in every year to elect thirty members as a "committee for general purposes" to hold office for twelve months from March 25 next following.

By clause 91 no person shall be elected to the said committee who shall not have been a member for the space of five years immediately preceding the day of election.

By clause 94 the committee for general purposes shall admit such persons, whether proprietors or not, as they shall think proper to attend the Stock Exchange for transacting the business of a stockbroker or jobber for one year commencing March 25 then instant or last preceding the admission on payment of the entrance fee (if any) and annual subscription for the time being fixed by the trustees and managers for such admission, and subject to any rules and regulations from time to time made by the committee. The money paid by the members for the liberty of attending and transacting business shall be paid to the trustees and managers for the general purposes of the undertaking.

By clause 95 the committee for general purposes shall regulate the transaction of business on the Stock Exchange and may make rules respecting (inter alia) "the admission, expulsion, or suspension of members," and generally for "the good order and government of the members."

By clause 97 the committee for general purposes shall appoint

their own secretary to be paid by the trustees and managers under clause 50.

By clause 100 neither the committee for general purposes nor the members shall exercise any control over the management of the affairs of the undertaking, or in any matter relating to the undertaking except the transaction of business on the Stock Exchange, or any matter on which the said committee are authorized by the deed to make rules and regulations.

By clause 109 the proprietors may by special resolution increase the capital of the undertaking by the creation and issue of new shares, and generally may alter, revoke, or annul all or any of the clauses, covenants, and agreements contained in the deed, and make any new or other regulations for the management of the affairs of the undertaking or the trusts thereof or in any way relating thereto.

The following rules and regulations were from time to time made by the committee under clause 95 :—

Rules 1, 2, and 5 reproduce clauses 90, 91, and 95 respectively.

By rule 10 (1.) a resolution of the committee shall not be valid or put in force until confirmed unless it relate to the shutting of the House, the admission of members or clerks, *the re-election of members*, the readmission of defaulters, &c. The italicized words were inserted on January 29, 1917, by the 1916-17 committee.

By rule 16 the committee may expel or suspend any member who may violate any of the rules, or who may fail to comply with any of the committee's decisions, or who may be guilty of dishonourable or disgraceful conduct.

By rule 21 the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant. A member re-elected, admitted, or re-admitted shall become liable for the amount of subscription and fees fixed by the trustees and managers.

By rule 22 every member or applicant for re-election, admission, or re-admission shall declare whether he proposes to act as a broker, dealer, or clerk, or that he is not engaged in active business, and no member shall alter his status from broker to dealer or from dealer to broker without one month's notice to the committee.

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By rule 23 a member desirous of being re-elected shall in each year address to the secretary a letter of the form 1 in the appendix. (This form asks for re-election for a year.)

By rule 26 a candidate for admission must obtain the nomination of a member willing to retire in his favour, or of a former member, or of the legal personal representatives of a deceased member. A nominee must be "eligible under these rules."

By rule 29 (1.) a candidate who has been a foreign subject is ineligible until he has been naturalized for five years and a resident in this country for ten years.

By rule 29 (2.), passed on January 5, 1916, by the 1915-16 committee, a candidate of German, Austrian, or Hungarian birth is ineligible.

By rule 31 a bankrupt is ineligible.

By rule 32 a candidate for admission must not be under twenty-one and must be recommended by three members. Each recommender must engage to pay 500*l.* to the candidate's creditors, in case the candidate is declared a defaulter within four years of his admission. (The form of application asks for admission for a year. See appendix, form 4.)

By rule 35 a member intending to object to the re-election of a member, the admission of a candidate, or the re-admission of a defaulter shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot.

By rule 37 the election of new members shall be by ballot and must be carried by a three-fourths majority in a committee of not less than twelve members.

By rule 38, if an applicant for re-election, admission or re-admission be rejected, he shall not be *voted on or* balloted for again before March 25 then next ensuing. The italicized words were added on January 29, 1917, by the 1916-17 committee.

By rule 39 a member on his election shall, before exercising any of the privileges of membership, become a proprietor in the Stock Exchange by acquiring one share in the case of a member admitted with two sureties, or three shares in the case of a member admitted with three sureties. The secretary shall not issue an admission notice to a new member until it has been reported to him by the secretary to the trustees and managers that the new member has

been duly registered as a proprietor of the required number of shares.

By rule 53 a member shall not enter into partnership with a non-member.

By rule 191, passed on November 6, 1916, by the 1916-17 committee, a broker may not share commission with a former member who has applied for re-election and has been rejected.

In August, 1914, the Stock Exchange was closed owing to the war. Emergency rules were made under which bargains open on July 29, 1914, were continued until twelve months after the conclusion of peace on certain conditions as to cover and payment of interest.

On January 4, 1915, the Stock Exchange was re-opened subject to certain conditions imposed by the Treasury as "absolutely necessary in the national interests." Their object was: "(*a*) To safeguard the London market against forced realization of securities and against operations for the purpose of depressing prices. (*b*) To close the market to the enemy both directly and indirectly."

Temporary regulation 2 provides that the following only will be admitted:—(*a*) British-born members or clerks. (*b*) Naturalized members or clerks who have re-exhibited their letters of naturalization to the committee and, in the case of naturalized members or clerks of enemy origin, have satisfied the committee that they have been denationalized in their country of origin.

Temporary regulation 9 provides that no securities will be a good delivery unless supported by a declaration by a banker, broker, or other responsible party that they have remained in physical possession in the United Kingdom since September 30 and have not since the outbreak of war been in enemy ownership.

Temporary regulation 12 provides that a broker before completing any selling order must obtain a declaration in writing from his client, and must fully satisfy himself that such selling order is not on behalf or for the benefit of alien enemies either directly or indirectly.

On May 7, 1915, the *Lusitania* was torpedoed, and on May 8, 1915, in consequence of the feeling then prevailing against members of German and Austrian origin, the 1915-16 committee issued a circular advising them to keep away from the House at present.

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This advice was loyally followed by the great majority of those members.

On November 10, 1915, certain members belonging to the Anti-German Union and other members in sympathy with their views presented a petition to the 1915-16 committee against the re-election of members of German or Austrian origin.

On January 26, 1916, the 1915-16 committee wrote to the petitioners saying "The petition . . . . has received most careful consideration. The committee are fully alive to the possibility that there may be naturalised members of enemy birth whose membership of the Stock Exchange is undesirable. Quite apart however from legal difficulties they are not prepared to deal with the naturalised German and Austrian members as a body on the lines laid down in the petition. In their petition the memorialists recognise the fact that there are cases in which the refusal to re-elect would be neither desirable nor fair, and that they wish exceptions to be made in such cases. They however throw the onus of selection on the committee who are thereby called upon to accept sole responsibility. The committee wish to point out that they are in no better position than the rest of the House for discriminating between members unless an objection to any individual member is submitted to them. In this connection the committee wish to call the attention of the members to their rights and obligations under rule 35 and to say that they on their part are fully prepared to discharge the duty imposed upon them by carefully considering and adjudicating upon any objection to the re-election of a member communicated to them in accordance with that rule. Such communications will in all cases be treated as confidential."

On March 9, 1916, a meeting largely attended by members of the Stock Exchange, some of whom, including the chairman, Mr. Johnstone, formed a sub-committee of the Anti-German Union, passed a resolution to oppose the re-election of all persons of alien enemy birth elected subsequent to March, 1895, with the exception of those who were serving or who had sons serving in the Imperial forces. On the same day Mr. Johnstone, the chairman, acting on behalf of the Anti-German Union, wrote to the 1915-16 committee informing them of the resolution and stating that of the 485 members present 408 voted for the resolution, 41 against, and 36 did not

vote, and that those voting for the resolution were requested by so doing to authorize the Anti-German Union to lodge objections against all members coming within the resolution and stating that "The grounds of our objections are that the members in question are of alien enemy birth. We will send you a list of the members as soon as we can prepare it." This list was sent the next day.

On March 10, 1916, the 1915-16 committee replied. After setting out their letter of January 26, 1916, declining to deal with objections en bloc, they proceeded: "This letter discloses a policy from which the committee are unwilling to depart and they are not prepared to consider the general notice of objection based on an arbitrary date as a sufficient objection under rule 35. Apart altogether from a personal legal liability to themselves, which may or may not be remote, the committee are not prepared to submit the House to a dislocation of business and certain of its members to individual hardship which the adoption of the policy advocated at the meeting would entail. The dislocation of business would affect firstly the clients of the members rejected whose interests, under the emergency rules, the committee have pledged themselves to safeguard, and secondly the members who have accounts open with the members who were rejected. The hardship would consist in loss of the privileges of membership and of business to many members—enemy born it is true, but of undoubted loyalty—and to their partners of British birth. For these reasons the committee feel bound to proceed with the consideration of the re-election of these members as they are required to do under rule 21." The letter of March 10 was posted up in the Stock Exchange on the same day.

In the election of members held in the same month sixteen members of enemy birth were originally refused re-election, but on reconsideration eleven of them were re-elected, leaving the plaintiff in *Cassel* v. *Inglis* (1) and four others not re-elected. In the election of the 1916-17 committee in the same month six candidates proposed by the Anti-German Union or their supporters were elected on that committee in the place of six of the 1915-16 committee who lost their seats.

On October 27, 1916, the Anti-German Union asked the 1916-17

(1) [1916] 2 Ch. 211.

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committee to receive a deputation for the purpose of expressing their views and hearing that committee's views on the question of re-election of members of enemy birth.

On November 6, 1916, the day that rule 191 was passed, the 1916-17 committee received the deputation, when a speech was made by Mr. Johnstone, who stated that the committee election of March, 1916, "had shown that the opinion of the 'House' was in favour of the exclusion of the large majority of members of alien enemy birth. This was shown by the rejection of several members of the 1915-16 committee who had partners of enemy birth. He considered that the demand for further action had increased both in intensity and volume from the 'House' and from the country, and that the need for eradicating German influence had grown. At the same time the difficulties had in their opinion decreased. From the legal point of view the 1916-17 committee had the advantage of the decision in *Cassel's Case*. (1) From the point of view of hardship to clients and to members who had accounts open with members of enemy birth, he believed that there had been a considerable decrease in their commitments. He suggested that this opinion might be tested if the committee called for a return of outstanding accounts, as they had done at the beginning of the war. If it were found that the outstanding obligations of such members were not important, the only remaining obstacle was the possible injustice to a few loyal subjects, but he thought that even this should not weigh against a grave risk to the country. The policy they wanted to see adopted was the exclusion of all members of enemy birth, with some possible exceptions in cases where the members concerned could be proved to be of undoubted loyalty. If that policy were adopted the committee could rely on their assistance. They did not want to drag the question before the public, but considered it their duty to the country to leave no stone unturned to obtain the exclusion of all but a few who might be specially excepted."

On February 7, 1917, the Anti-German Union wrote asking to be informed not later than March 12 whether members to whose re-election they had lodged an objection had or had not been refused re-election, and on February 14 the 1916-17 committee

(1) [1916] 2 Ch. 211.

authorized the secretary verbally to inform any members of the result of the re-election applications.

On February 5, 7, 12, 1917, the 1916-17 committee drew up for itself the following "draft procedure on re-election" which it proposed to adopt in enemy birth cases.

Rule 1: "All applicants objected to on the ground of their enemy birth, origin or connection to be put on a separate list."

Rule 2: "On receipt of the application, the secretary to issue to each applicant the following notice." [Here followed a printed notice stating that objection had been lodged under rule 35 on the ground of enemy birth, origin, connection; suggesting that the applicant should send a written statement of all facts he desired to bring to the committee's notice; inquiring as to evidence of denationalization; and whether the applicant was at present in the United Kingdom, and whether he had been out of it since the war began; and stating that if the committee desired to see him, a further notice would be sent.]

Rule 4: "Each case to be considered separately. The secretary to state the nature of the objection, the date of the candidate's naturalization. . . . . The candidate's answer to the committee's notice to be read. The committee to decide whether they require the candidate to attend. On his attendance he is to be asked if he has anything to add to his written reply. . . . . No question to be put except by the chairman who will consult the committee before putting any question. . . . . No question asked by the candidate with the view to eliciting grounds of objection other than those disclosed or known to him to be answered."

Rule 6: "No reasons for any decision should be stated to the applicant or recorded, but simply the result of the voting."

On February, 15, 1917, the plaintiff, a partner in the firm of Seligman, Weinberger & Pearson, who, though born in Germany, became a naturalized British subject in April, 1892, and a member of the Stock Exchange in January, 1895, since when he had been regularly re-elected, and who had paid 500 guineas entrance fee and 30 guineas annual subscription and voluntarily acquired twenty shares costing 4000*l.*, but which if now sold under clause 25 would fetch 1400*l.*, applied for re-election. His partners the Seligmans

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were of American and Pearson of British nationality. His sons were schoolboys in the O.T.C. at Rugby and Westminster.

On the same day he received in reply the printed notice settled by rule 2 of the draft procedure. The objection stated was "enemy birth," the words "origin" and "connection" being struck out.

On February 19, 1917, the plaintiff replied as follows: "I have to acknowledge receipt of your letter of the 15th instant, and in reply thereto I wish to state that I came to England in 1887, being then twenty years of age. At the earliest possible date permitted by law, that is to say, five years after I reached this country, I put in an application to be naturalised as a British subject, which application was promptly granted, and was denationalised in Germany. The relative papers were submitted to your committee in 1915. I have been continuously engaged in business in London from the time of my arrival here in 1887. I have not been out of England since the declaration of war, and, in fact, I have not left this country since 1887 for a longer period than three weeks at any one time. In 1896 I married an Englishwoman, and my family consists of two girls and two boys, the latter aged fifteen and thirteen; my daughters are unmarried. I have always been a loyal British subject both in act and thought, and I submit that there cannot possibly be any good ground for the objection which you state has been made to my re-election. I shall be happy to answer any further questions the committee may wish to put to me."

On March 8, 1917, the plaintiff was interviewed by the 1916-17 committee. His account of the interview was as follows: "I entered the committee-room and the chairman asked me to be seated. He then said 'Your letter, Mr. Weinberger, to the committee has been read to the committee. Do you wish to add anything further?' I said, 'Gentlemen, I can only confirm what is laid down in my letter to you. I came to this country thirty years ago, and as a clerk and a member of the House have always been employed on Stock Exchange business. We induced or assisted our clerks to join the forces at the earliest possible moment. My wife is doing voluntary work on the care committee of a London County Council school, my eldest daughter is working at a labour exchange, and my youngest one is in a military hospital, and my two boys are still too young to be in the Army. My wife lost one brother in September,

1916; her second brother was severely wounded and lost the use of his right eye; and she has besides two more brothers who have commissions in the Army. I have never done anything I need be ashamed of, and there is not the slightest reason that I should forfeit the esteem and respect of my fellow members.' The chairman then said, 'Thank you,' and I left the room. That was all that passed. Not a single question in any shape or form was asked."

On the same day the plaintiff's application for re-election was rejected.

Letters were then written by the plaintiff, his partners and friends, protesting against this decision and vouching for the plaintiff's loyalty, but the 1916-17 committee refused to reconsider their decision. The plaintiff had therefore to dissolve his partnership and was precluded by rule 191 from sharing commission.

Letters of a similar character were written by other rejected members in answer to the objection of enemy birth, and a more or less similar procedure was adopted in their cases. At this election fifty-seven members of enemy birth were rejected and fifty were re-elected.

On April 5, 1917, as already reported on an application for particulars (1), the plaintiff commenced this action against the 1916-17 committee who had refused him re-election and the 1917-18 committee now in office, alleging (inter alia) that in declining to re-elect him the 1916-17 committee did not exercise any discretion, either bona fide, fairly reasonably, or judicially, but had acted arbitrarily. There were no facts or ground upon which they could exercise any discretion against his re-election. No reasons or facts were adduced nor existed which could have legitimately operated, or did operate, in their minds to induce them properly to decide that he was not eligible for re-election. Their decision was against natural justice and was not a proper exercise of their judicial discretion. The plaintiff claimed:

1. A declaration that the decision of the 1916-17 committee is invalid and inoperative and of no force and effect.

2. A declaration that the 1916-17 committee have not duly or properly heard, considered, or determined the plaintiff's application.

3. A declaration that the plaintiff is entitled to be re-elected

(1) Ante, p. 133.

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and/or is still a member and/or is entitled to the rights and privileges of the Stock Exchange.

4. A declaration that the plaintiff has not ceased to be a member.

5. An order that his name be restored to the list of members.

6. A mandatory injunction to the 1917-18 committee (*a*) to re-elect the plaintiff and/or (*b*) to deal with his application in accordance with the true meaning and intent of the rules and regulations of the Stock Exchange.

7. An injunction restraining the 1917-18 committee from interfering with the plaintiff's enjoyment of the Stock Exchange and his rights as a member.

8. Further or other relief.

9. Costs.

The defendants denied that the discretion of the committee under rule 21 was a judicial discretion, and alleged that the 1916-17 committee, acting bona fide and honestly in the exercise of their duty and discretion under that rule, did not re-elect the plaintiff because they did not deem him eligible to be a member for the year 1917-18, and for no other reason.

By paragraph 12 of their defence they submitted that the statement of claim disclosed no cause of action or right to any of the relief claimed, and by paragraph 13 that the plaintiff had not been deprived of any right of property and had no sufficient proprietary interest in securing re-election to entitle him to maintain the action.

The action came on for hearing before Astbury J. on January 21, 1918.

Gore-Browne, K.C., Tomlin, K.C., and *Alexander Neilson*, for the plaintiff. The word "shall" in rule 21 is imperative, and the word "deem" connotes a judicial and not an arbitrary discretion: *Russell* v. *Russell*. (1) A decision based on an irrelevant fact like enemy birth is arbitrary and void. This distinguishes *Cassel* v. *Inglis* (2), where the grounds of the decision were not known. It is true that the committee need not state the reasons for their decision, but before deciding they ought to play the game and at least give the applicant some inkling of the real objection he has to

(1) (1880) 14 Ch. D. 471, 479. (2) [1916] 2 Ch. 211.

meet. The draft procedure was evidently framed to prevent this. No real objection was ever formulated and the plaintiff was only told of the enemy birth objection. That was all he attempted to deal with. Now even the committee are not entitled to treat a certificate under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7, as a scrap of paper, so that in the plaintiff's case his enemy birth was not a relevant objection in itself. The committee had no right to treat it as relevant, and if it was the only objection, they had no right to differentiate between the fifty-seven rejected and the fifty re-elected. If they chose to think it imported disloyalty, they ought to have formulated that objection. But it is clear that enemy birth without more does not prove a man guilty of disloyalty, and even if the committee took that un-English attitude, the plaintiff in fact proved his loyalty up to the hilt. The 1916-17 committee, departing from the irreproachable attitude of their predecessors, bent to the will of the Anti-German Union, whose policy speaks for itself.

As soon as the Court is satisfied that the decision was arbitrary or based on irrelevant matter, it has the right to interfere—*Ex parte Penney* (1); *In re Coalport China Co.* (2); *Wood* v. *Woad* (3); *In re Bell Brothers* (4); *In re Bede Steam Shipping Co.* (5)—and protect the plaintiff's proprietary and contractual rights—*Rigby* v. *Connol* (6); *Baird* v. *Wells* (7)—even if he were an actual alien: *Ellert* v. *Associated Newspapers.* (8) Non-re-election is as great a stigma as expulsion, and in addition to that the plaintiff has lost his entrance fee, his partnership, his shares, and even his right to share commission.

Upjohn, K.C., Hon. Frank Russell, K.C., and *Douglas Hogg, K.C.,* for the defendants. The plaintiff has made out no case. The committee is not a judicial body, and the Court cannot interfere with, and still less usurp, its discretionary powers under rule 21: *Cassel* v. *Inglis* (9); *Blanchard* v. *Dunlop.* (10)

The relief claimed is entirely misconceived. A void refusal to

(1) (1872) L. R. 8 Ch. 446, 450.
(2) [1895] 2 Ch. 404, 409.
(3) (1874) L. R. 9 Ex. 190, 196.
(4) (1891) 65 L. T. 245.
(5) [1917] 1 Ch. 123.
(6) (1880) 14 Ch. D. 482, 487.
(7) (1890) 44 Ch. D. 661, 675, 676.
(8) (1917) *The Times,* December 13, p. 3 *a.*
(9) [1916] 2 Ch. 211.
(10) [1917] 1 Ch. 165, 170, 173.

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register a transferee of shares leaves him entitled to registration: *In re Bell Brothers.* (1) A void expulsion from a society leaves the man still a member: *Wood* v. *Woad.* (2) But a void refusal to re-elect a member of the Stock Exchange for a new year merely leaves him in statu quo, i.e., with his membership expiring on March 24 of the current year. A declaration that the plaintiff's rejection was void would be nugatory and a declaration that he is still a member clearly wrong. The only possible relief is the mandatory injunction—6 (*b*)—directing the 1917-18 committee to do their duty, which they already have every intention of doing. There is no claim for a general construction of the rules. The Court is merely dealing with the validity or invalidity of the rejection of this particular plaintiff.

The committee's discretion is analogous to that of the licensing justices in *Sharp* v. *Wakefield* (3), which applies equally to renewal and to original licences. The draft procedure was perfectly sound. The obvious meaning of rule 4 is that all questions must be put through the chairman. But, in fact, no questions were put, so that the rule, even if obnoxious, was never put in operation.

The obvious inference from the fact that fifty-seven enemy birth applicants were rejected and fifty re-elected is that enemy birth was not the ground of decision. But as enemy birth is an absolute bar to a new candidate under rule 29 (2.) it must be relevant to eligibility for re-election, and, if relevant, the committee are the sole judges of its weight in any particular case. An objection under rule 35 cannot limit their discretion under rule 21. The fact that former committees took a wrong view of their duties and treated the objection lightly is irrelevant. The later committee has learnt wisdom. They are entitled to consider the dangers and apprehensions arising from enemy birth and need not wait for proof of an overt act or proof of an evil intent. This is the practice adopted in internment cases: *Ex parte Liebmann.* (4) The Court cannot review their decision without knowing all the facts, and as it has no right to compel the committee to give evidence, and they have not the remotest intention of doing so, it cannot

(1) 65 L. T. 245.
(2) L. R. 9 Ex. 190, 196.
(3) [1891] A. C. 173, 183, 187.
(4) [1916] 1 K. B. 268, 274, 278.

ascertain them: *In re Wilkes's Charity* (1); *Rex* v. *Archbishop of Canterbury* (2); *Reg.* v. *Ipswich Corporation* (3); *Hayman* v. *Rugby School Governors.* (4)

Even if the plaintiff had proved that the 1916-17 committee's decision was arbitrary, he has still no right of property against them or their successors. That is the necessary foundation for relief by way of injunction or specific performance: *Baird* v. *Wells* (5); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (6); *Rigby* v. *Connol* (7); *Forbes* v. *Eden.* (8) He has not even a right in contract against them, as they were only agents for the trustees and managers. He might conceivably have claimed damages in tort, but he has in fact suffered no damages for which the defendants are responsible. They have nothing to do with his entrance fee, share, partnership, or bargains. The Stock Exchange is very like a proprietary club. The property and undertaking are vested in the trustees and managers with the object of making profits for the proprietors. The particular way of making profits is by allowing members to use the building on payment of certain fees and subscriptions. These members are elected by the committee as delegates of the trustees and managers. But the committee and members have nothing to do with the management of the property or undertaking (clause 100). They are merely concerned with the membership and the mode of carrying on the Stock Exchange business under clauses 90 to 101. The management of the property and undertaking rests with the trustees and managers on behalf of the proprietors and is regulated by clauses 2 to 89 and 102 to 109. The committee owe a duty to the trustees and managers and proprietors as a whole, not to the individual plaintiff, and if they have failed in their duty the plaintiff can only sue on behalf of himself and all other proprietors, joining the trustees as necessary parties. In their absence he cannot get any relief either in contract or by way of specific performance.

Tomlin, K.C., in reply. As the defendants have given no evidence

(1) (1851) 3 Mac. & G. 440, 448, 449.
(2) (1812) 15 East, 117, 157.
(3) (1705) 2 Ld. Raym. 1232.
(4) (1874) L. R. 18 Eq. 28.
(5) 44 Ch. D. 661, 675, 676.
(6) (1874) L. R. 9 Ch. 331.
(7) 14 Ch. D. 482, 487.
(8) (1867) L. R. 1 H. L. Sc. 568.

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the Court will accept the plaintiff's version of the facts. The temporary regulations have now abolished all danger of speculation or dealing with the enemy, so that all apprehensions on that account may be disregarded. Temporary regulation 2 shows that the Treasury did not object to enemy birth per se. It only imposed certain conditions. Rule 29 (2.) of January 5, 1916, bars new "candidates" of enemy birth. Surely this read with rule 29 (1.), and still more with temporary regulation 2, implies that old members are still eligible. The temporary regulations and the rules—e.g., rules 26, 29, 31—limit the scope of eligibility, but there is nothing to make an old member of enemy birth ineligible. The objection, except as an item of evidence of some unformulated charge, is therefore wholly irrelevant, and on the merits the plaintiff is entitled to relief.

As to the technical objection, though no longer a member entitled to use the House, the plaintiff is still a proprietor. It is not a case of suing in contract or tort. It is a case of administering a trust. The committee are not agents of the trustees and managers for the purpose of contracting with the members. They are sub-trustees appointed to manage a particular department of the trust, and they have failed in their duty to the plaintiff, who is still a cestui que trust as proprietor. The plaintiff is entitled to relief against those sub-trustees, without joining the head trustees. If the head trustees were so ill advised as not to recognize the decision and allow the plaintiff to use the House, the plaintiff would at once start a fresh action against them. In this action, however, the question of property or licence does not really arise. The dicta in *Baird* v. *Wells* (1) are virtually modified by *Jones & Sons* v. *Earl of Tankerville* (2) and *Hurst* v. *Picture Theatres, Ld.* (3), and *Wood* v. *Leadbitter* (4) is no longer good law.

Upjohn, K.C., in rejoinder. *Jones & Sons* v. *Earl of Tankerville* (2) and *Hurst* v. *Picture Theatres, Ld.* (3) were cases of licence coupled with a grant, and do not touch the decision in *Baird* v. *Wells*. (1) A bare licence is always revocable: *Thomas* v. *Sorrell*. (5) *Wood* v. *Leadbitter* (4) turned on a point of pleading. The plaintiff

(1) 44 Ch. D. 661, 675, 676.
(2) [1909] 2 Ch. 440, 443.
(3) [1915] 1 K. B. 1, 14.
(4) (1845) 13 M. & W. 838.
(5) (1673) Vaugh. 330, 351.

sued for an assault committed in turning him out of a race enclosure. The defendant pleaded that he was a trespasser. The plaintiff made the wrong reply. Instead of pleading the owner's licence and new assigning on a contract not to revoke it, he simply set up an irrevocable licence, and not unnaturally failed.

Cur. adv. vult.

Feb. 6. ASTBURY J. The plaintiff, who has been a member of the Stock Exchange for many years, failed to secure re-election in March, 1917, and he seeks a declaration that the rejection in that month of his application for re-election by the 1916-17 Committee for General Purposes was invalid, and consequential relief.

In 1916 I tried a somewhat similar case of *Cassel* v. *Inglis*. (1) The relevant clauses of the deed of settlement under which the undertaking called the Stock Exchange is governed, and the rules and regulations made thereunder, are fully set out in the report, and I do not propose to repeat them. I adhere to the decision I then gave as to the meaning and effect in law of the deed of settlement and the rules and regulations governing the election and re-election of candidates and members. The reasons that led to the conclusion at which I arrived appear fully in the judgment.

In *Cassel's Case* (1) the Court was not in possession of the grounds on which the 1915-16 committee arrived at their conclusion, and the plaintiff in that case neither alleged nor proved that the committee wrongfully held him guilty of any offence, nor that any specific charge was made or decided against him, nor that the committee acted from any improper motive, nor that their decision was not come to, and their procedure selected in the circumstances, within the limits of honesty, reason, and justice. The Court had consequently, for the reasons I then stated, no jurisdiction to interfere. [His Lordship then read clauses 94 and 95 and rule 21, and continued:] The present case differs from *Cassel's Case* (1) in several important particulars—that is to say: (1.) A specific objection was lodged under rule 35 to the plaintiff's re-election on the ground that he was of alien enemy birth. (2.) This objection

(1) [1916] 2 Ch. 211.

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was communicated to the plaintiff by the 1916-17 committee, and he was asked to supply a written statement of all facts which he desired to bring to the notice of that committee. (3.) The plaintiff's case was dealt with individually by the committee, who interviewed and discussed the position with him before arriving at their decision. (4.) Evidence has been called by the plaintiff, which has not been answered by the defendants, from which I find the following facts :— (*a*) That the above objection was the only one lodged against the plaintiff ; and (*b*) That it, and what it was appreciated by both parties to involve, was the ground, and the only ground, on which the committee's decision was based.

This case is therefore distinct from *Cassel's Case* (1) in that the Court has been informed by evidence of the objection to the plaintiff's re-election, and of the reason or grounds for the decision complained of, and is in a position to judge of their sufficiency in law. Having regard to the nature of this objection and the manner in which it was dealt with, the Court is called upon, on evidence adduced before it, to decide whether the decision of the 1916-17 committee was due to improper motive and arrived at arbitrarily and capriciously.

The authorities on these matters appear to me, having regard to the provisions of the deed of settlement and the relevant rules and regulations, to make it clear that if the committee came to their conclusion after considering that only which it was legally within their competence to discuss as an objection to the eligibility of the plaintiff, and if, independently of whether they were bound to do so or not, they drew his attention to the objection in a manner which brought home to him its nature and bearings, and gave him a fair and reasonable opportunity of dealing with it, then, unless the Court is satisfied that they acted from some improper motive, or unfairly or dishonestly, there is no appeal from their decision, whether the Court approves of it or not, in fact, and whatever hardship it may involve. In these circumstances the committee, by the contract by which both parties are bound, are the sole judges of the question of eligibility or non-eligibility.'

In *In re Wilkes's Charity* (2), which was an action to enforce a direct trust under which the holders of a fund were entitled to select

(1) [1916] 2 Ch. 211. (2) 3 Mac. & G. 440, 448.

an object of the trust whom they should deem eligible, Lord Truro said that the result of the decisions in such cases was that "It is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases."

In *Ex parte Penney* (1), dealing with the right of directors under the company's articles to approve or disapprove of a transferee of shares, James L.J. said: "But if there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this Court has any jurisdiction whatever to sit as a Court of Appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed." In *In re Bell Brothers* (2), which was also a case with regard to directors' discretionary powers to refuse a transferee, Chitty J. said: "The directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw unfavourable inferences against them. In these articles there is an express provision protecting the directors against any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not; or, in other words, to ascertain whether the directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate, the Court will not overrule the directors' decision merely because the Court itself would not have come to the same conclusion."

The question in this case therefore is, Have the 1916-17 committee

(1) L. R. 8 Ch. 446, 449. (2) 65 L. T. 245, 246.

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acted within the law in dealing with the plaintiff's application for re-election?

The relevant facts, and the arguments based upon them, are as follows: In March, 1917, there were 107 members of the Stock Exchange of enemy birth, and the 1916-17 committee received the above-mentioned objection under rule 35 in respect of all of them. Fifty were re-elected and fifty-seven, including the plaintiff, were not. Each of these fifty-seven had been re-elected in March, 1915, and March, 1916, though in the latter year a strong agitation existed on the Stock Exchange against their re-election.

The plaintiff contends that enemy birth per se is not a valid and sufficient objection within the rules, because members in this class in 1915, 1916, and 1917 were re-elected, and because the mere accident of birth is in itself no objection at all. He urges that the only valid objection to re-election must be one based on some ground directly relevant to Stock Exchange membership, and the qualifications for exercising it, such as individual disloyalty, in respect of which enemy birth might be a relevant factor. From this it is said to follow that if any objection was really held by the committee to apply to the plaintiff and the rest of the fifty-seven members who failed to secure re-election, it cannot have been mere enemy birth, and that the objection that, in fact, prevailed was not therefore communicated to them, and they were given no opportunity of dealing with it. He further contends in the alternative that to give notice of enemy birth as an objection, and throw the onus upon the person so objected to to prove his loyalty, after naturalization in this country, is contrary to the elementary principle of English justice that a man is deemed innocent until he is proved to be guilty.

To appreciate the position it is necessary to go back some distance in the history of the undertaking since the war and then to refer shortly to certain facts in connection with the action of the committee in March, 1917. [His Lordship then referred to the temporary regulations imposed by the Treasury on the re-opening of the Stock Exchange in January, 1915, and continued:] These regulations make it plain that the Treasury and the authorities of the Stock Exchange appreciated the necessity for stringent rule, being observed in the national interests, as to the regulation of

business on the Exchange, in order to prevent as far as possible help and information being afforded to the enemy and to close up as far as practicable avenues through which this might be done. [His Lordship then referred to the notice following the *Lusitania* outrage, the subsequent correspondence between the Anti-German Union and the 1915-16 committee, the passing of rule 29 (2.) by the committee, the results of the elections of members and of the 1916-17 committee in March, 1916, the passing of rule 191 by that committee, Johnstone's speech at the deputation, the alteration of rule 10 by the same committee, the "draft procedure on re-election," and the special facts relating to the plaintiff's application, letter, and interview with the same committee. His Lordship thought that the suggestion in Johnstone's speech that the possible injustice to a few loyal subjects should not weigh against a grave risk to the country was an unfortunate method of stating what he hoped was really the speaker's intention. His Lordship continued:] I am satisfied that in certain cases great hardship has been inflicted by the 1916-17 committee in fact. If I had myself to decide the question of eligibility on the evidence before me, and without knowing what passed during the discussion between the various members of the committee present when the respective decisions were arrived at, the result in some of these cases might, and I have little doubt would, have been different. This, however, as I have said, is not the issue which I have to try or which I have any jurisdiction to entertain.

I will now consider the question which is open to me, namely, whether the 1916-17 committee in March, 1917, did or did not keep within the law in deciding as they did.

First, as to the sufficiency of the objection in law and the legality of the procedure adopted by the committee with regard to it. I am unable to accept the plaintiff's contention, and I am satisfied by the evidence of the plaintiff and his witnesses that they respectively appreciated that, as the result of the known experience of the civilized world in this unhappy war, they were objected to on the ground that they belonged to a class that was looked upon with grave apprehension and suspicion by reason of their birth and original nationality and by reason of the opportunities which might result therefrom, innocently or otherwise, and that it fell to them to displace to the best of their ability the views that they knew were so

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held by the majority, and apparently the large majority, of their fellow-members.

The apprehensions, whether well founded or not in any individual case, were concerned with matters directly relevant to eligibility for membership of the Stock Exchange, and they were known to and appreciated by the plaintiff and all the witnesses who have been called on his behalf. I am unable to hold that the procedure adopted by the committee was vitiated by not affording them an opportunity of appreciating the objection so made to their re-election and dealing with it as they might deem advisable. The members who failed to secure re-election were not found guilty, as has been contended, of any crime or offence unless they proved their innocence, but were asked to supply grounds upon which the committee might feel satisfied, having regard to the objection made and admitted, that they were eligible and suitable notwithstanding to be re-elected for a further term.

Upon this question the committee had a wide and absolute discretion so long as, acting honestly, they did not base their conclusions upon grounds which in law they were not entitled to entertain, and the submission on behalf of the plaintiff that he was misled by the committee suggesting that the charge against him was one thing, while they dealt with him on another that was not disclosed, is not in my judgment well founded.

On the question whether the objection as made and understood was one which in law the committee were entitled to consider, it must further be observed that their predecessors, the 1915-16 committee, had already come to the conclusion that in future no candidates of enemy birth should be admitted at all (see rule 29 (2.)), and it seems to me impossible to hold that what was to be considered an absolute bar in the case of new candidates should be treated as a matter that could not be legally considered in the re-election of old members.

It is urged that this is not an objection "within the rules," and I am asked to put a construction upon them which would prevent the committee from entertaining it. I am unable to do so. The rules contain various restrictions upon the discretion of the committee under rule 21 in the direction of denying to them the right of exercising it in favour of certain classes of people; but I find

no positive direction or suggestion that it "shall" be exercised in favour of any person, in whatever class he may be placed, who does not pass the test provided by the rule.

Secondly, as to whether the 1916-17 committee acted from an improper motive, or unfairly, or dishonestly, it is submitted that, having regard to the views expressed by the 1915-16 committee in January and March, 1916, and to the change of view that prevailed in 1917, the 1916-17 committee that dealt with the plaintiff was actuated by the improper motive of bending to the will of the Anti-German Union, knowing it to be unjust and unfair, and that their action was arbitrary and capricious. In support of this, reliance is placed upon the rules of procedure that they laid down for themselves in dealing with members of enemy birth, and in particular upon those providing that no question asked by a candidate with a view of eliciting grounds of objection other than those disclosed or known to him should be answered, and that no reason should be given for the committee's decision. The second of these cannot, having regard to the law on this subject laid down in *Cassel's Case* (1) and a long line of authorities, be made the subject of criticism; and as to the first, although at first sight it looks harsh and unreasonable, I am not prepared, having regard to the authorities, to hold that it was intended to have this result, and in any case it has not operated to the prejudice of the plaintiff and his witnesses, as no evidence has been given which satisfies me that any question was asked by any member to which an answer was refused.

The contention that I have already negatived, namely, that the 1916-17 committee put forward to the plaintiff one objection and acted on another, which he neither appreciated nor was given an opportunity of defending himself on, is next relied upon on this point, and, lastly, it is said that, having regard to the facts and evidence that I have referred to, to the hardship that has been proved to have been inflicted in the case of some of those members who were rejected, and to the fact that the 1916-17 committee have not thought fit to go into the witness-box and refute the charges made against them, I ought to hold that this submission is made out.

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On the evidence as it stands I feel little doubt, as I have stated, that in certain of the cases which came before them in March, 1917, the 1916-17 committee came to a wrong decision in fact. I regret that none of them have been called to deal affirmatively with the charges and suggestions that have been made against them in the unusual and extraordinary circumstances of the present case. After giving anxious consideration, however, to the evidence and to the arguments addressed to me upon it, I am not prepared to hold that they did not act honestly according to their lights, nor, indeed, is this really alleged by the plaintiff himself in the witness-box, taking his evidence as a whole.

The 1916-17 committee, or the majority of that committee, may honestly have arrived at a different view, having regard to changed times and circumstances, from that entertained by their predecessors, and the omission to go into the box may have been on the advice of counsel to preserve the right contended for, and which in ordinary cases they undoubtedly possess, of declining to imperil their wide discretion by giving reasons for their exercise of it. They are men of position and apparent and unchallenged individual integrity chosen by their fellow-members to regulate the affairs of a great business institution and at a time when its management has been rendered exceptionally difficult by the war. To hold that they acted from improper motives or without an honest desire to do their duty would require, in my judgment, more direct and unequivocal evidence than I have been furnished with in this difficult case.

Being unable, therefore, for the reasons I have stated, to hold that the committee in question acted on grounds not legally open to them, that their procedure was contrary to law, or that they did not honestly and legally come to the conclusion they did, the result is I have no power or jurisdiction to sit on appeal from their decision.

I am glad, however, to think that nothing that I have decided will prevent the plaintiff and the other witnesses who have given evidence before me, and who may desire to do so, from applying for re-election next March, and having the question of their eligibility reconsidered by the 1917-18 committee now in office.

I have in this case, as in *Cassel* v. *Inglis* (1), assumed that there is a fiduciary trust or contract enforceable by a member against the committee, and that the plaintiff has a sufficient proprietary interest to entitle him to seek relief in this Court, but under the constitution and rules of the Stock Exchange many difficulties exist in these respects, and also as to much of the relief claimed in this action and the proper and necessary parties thereto. It is, however, unnecessary in the circumstances for me to deal with these difficulties.

Having, as I hold, no right or power in the circumstances to decide whether the plaintiff is or is not eligible, in fact, for further membership of the Stock Exchange, or to give him relief in this action, I have no alternative but to dismiss it with costs.

G. R. A.

The plaintiff appealed. The appeal came on for hearing on March 19, 1918.

Tomlin, K.C., and *Alexander Neilson* (*Gore-Browne, K.C.*, with them), for the appellant.

Upjohn, K.C., *Hon. Frank Russell, K.C.*, and *Douglas Hogg, K.C.*, for the respondents.

[The arguments used in the Court below were substantially repeated.]

Cur. adv. vult.

March 26. Swinfen Eady L.J. (after stating the facts). Upon these facts the question is, what ground of complaint has the plaintiff or what title to any relief? His application for re-election was duly considered at a meeting of the committee; he was given a patient hearing with the opportunity of putting any facts before the committee and urging any reasons in favour of his re-election. The duty of re-electing such members "as they shall deem eligible" is vested in the committee, and, as they have not seen fit to re-elect the plaintiff, it is nothing to the purpose to say that he deems himself eligible, or that other persons deem him eligible, or that he ought to be considered eligible unless some definite charge

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against him or objection to him is raised and he is heard upon it and given an opportunity of meeting it. The rules do not so provide, and that is not the constitution of the body to which he desires to be re-elected. Members of the Stock Exchange are elected annually for one year only, and no member has any vested right to be re-elected, either absolutely or conditionally, upon his fulfilling certain qualifications, or in the absence of any disqualifications. If upon consideration of all the facts and circumstances relating to an applicant the committee do not deem him eligible for re-election, there is no power vested in any Court to overrule their decision, or to hold that they ought to have considered him eligible, or to decide that he is entitled to be regarded as if he had been re-elected or is otherwise entitled to the privileges of membership for another year. The question of an annual re-election is wholly different from any question of expulsion or suspension during the year for which a person has been duly constituted a member.

In the present case the committee gave no reasons for not re-electing the plaintiff, and therefore the Court is not in any position to judge of their sufficiency. They were not bound to give their reasons: see *Penney's Case.* (1) Even if reasons had been given, their sufficiency is left to the decision of the committee, and not of the Court. The defendants did not give any evidence, and the plaintiff did not call any members of the committee to ask their reasons for not re-electing the plaintiff. The judge below made a guess at their reasons; I decline to do so.

It was argued on behalf of the plaintiff that the only possible reason was that he was of German birth, and, if so, that such reason was wholly insufficient. It is manifest from what occurred at this election in March, 1917, that enemy birth was not an insuperable objection to re-election, as out of 107 members of enemy birth, fifty were re-elected and fifty-seven were not re-elected. If, however, the only objection to the plaintiff were that he was of German birth, and if the committee had acted on that alone, I am of opinion that they would have been amply justified in doing so. The good order and government of the members of the Stock Exchange is by clause 95 of the deed committed to the Committee for General Purposes. If they consider that the presence of any particular

(1) L. R. 8 Ch. 446.

individual in the House would be detrimental to the best interests of the institution, possibly leading to disorder or to a breach of the peace, they would not be bound to re-elect him. Again, the committee were entitled to take into account the national interests and consider whether the German method of "peaceful penetration" should be allowed to permeate the Stock Exchange. It was open to the committee to consider that some few members of German origin might take advantage of their position on the Stock Exchange to the detriment of the best interests of this country, and they might decide to exclude all of enemy birth except perhaps such as they had special reasons for knowing they could trust. The committee have during the present month made a new rule that a person of German, Austrian, Hungarian, Bulgarian, or Turkish birth shall be deemed ineligible to be a member of the Stock Exchange, and it is obvious that the committee have the support of the members behind them; indeed, at the election of members of the committee in 1916 six members supported by the Anti-German Union were elected, displacing six previous members of the committee. The Treasury notice previously read by me emphasizes the importance of closing the market absolutely to the enemy both directly and indirectly and of conforming to the spirit as well as to the letter of the regulations, and I cannot bring myself to entertain any doubt that the committee, in their course of conduct as disclosed by this case, including the refusal to re-elect the plaintiff and including the making of the new rule to which I have just referred, are acting solely in the national interest and in the interest of the great institution committed to their charge.

The evidence shows that the circular of the committee of May 8, 1915, advising members of German or Austrian birth to keep away from the House was not issued before it was needed. The plaintiff admitted that two members, whose names were mentioned, disregarding the notice, entered the House, and this led to unseemly disturbances, and on one occasion to a fracas. The committee are in duty bound to take notice of the strong feeling in the House against the admission of persons of German and Austrian birth. It must always be borne in mind that the members of the Stock Exchange in the usual course of business are brought very much into personal contact with each other.

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The plaintiff urged that, having regard to s. 7 of the Naturalization Act, 1870, he must be "deemed eligible" for admission to membership of the Stock Exchange; but this is an idle contention. His naturalization confers upon him the rights and privileges of natural-born British subjects, but the committee are not bound to "deem eligible" for re-election every natural-born British subject. It was further urged on behalf of the plaintiff that the whole proceedings of the committee were arbitrary and capricious, and moreover that the committee had no right to entertain or even consider any objection to a member unless notice had been previously given to him of the objection and an opportunity afforded him of being heard upon it. I cannot adopt that view. If a person were well-known to the committee to possess a very violent temper which he manifested towards every person with whom he came in contact, or to be exceedingly cantankerous, or to hold strongly, and freely express, opinions which were abhorrent to the great majority of orderly, respectable, and law-abiding people, it would manifestly not be in the interests of the good order and government of the Stock Exchange that such a person should be elected or re-elected a member. It would, in my opinion, be open to the committee to decide against re-electing such a person, although no notice of that objection had been given to the applicant himself.

Counsel for the plaintiff contended that his client was entitled to be re-elected unless deemed ineligible. This is reversing the rule. He has no right to be re-elected unless the committee deem him eligible. Again, counsel insisted that the failure to re-elect the plaintiff infringed the great principle of law in this country that a man was innocent until proved guilty. This language is wholly inapplicable to the present case. There is no question whatever of guilt or innocence, nor is the plaintiff charged with, or alleged to have committed, any offence whatever.

I may add that the duty of the committee with regard to re-electing members is, in my opinion, an ordinary act of management and administration by a governing body of an association involving exercise of discretion, but it is not a judicial or quasi-judicial act; and as the committee acted with perfect honesty and good faith, their decision cannot be questioned. I am very mindful that the plaintiff sustains great pecuniary loss by reason of non-election and

the consequences which result from it; but this is the necessary result of his position as a member of the Stock Exchange being dependent upon annual re-election.

In my opinion the appeal fails and should be dismissed.

BANKES L.J. This action was brought by the appellant for the purpose of challenging the validity of a decision of the committee of the Stock Exchange who in March, 1917, rejected his application for re-election as a member. The appellant claimed a declaration that this decision was invalid and inoperative and of no force and effect, with certain consequential relief. The action was tried by Astbury J. and dismissed by him upon the ground that there was no evidence before him upon which he could come to the conclusion that the committee had exceeded their powers in any way. At the end of his judgment the learned judge stated that he had assumed, without deciding the point, that the plaintiff had a sufficient proprietary interest to entitle him to seek relief in a Court of law; the learned judge also called attention to the difficulties in the plaintiff's way of obtaining any effective relief, even assuming that he had established the main ground of his complaint. In the view I take of the facts of this case, and of the powers of the committee of the Stock Exchange in reference to the election and re-election of members, it is really not material that I should deal with these questions at all. It is, I think, sufficient to say that I consider that there is considerable force in Mr. Tomlin's argument upon this branch of the case that a person once elected as a member of the Stock Exchange, though elected only until the next annual election, has, unless he has become disqualified before that time arrives, a contractual right to have his application for re-election considered and dealt with by the committee in accordance with the rules and regulations of the Stock Exchange for the time being in force. As has been pointed out by Mr. Tomlin, a decision of the committee rejecting the application must under the rules very materially and very directly affect rights of property of an applicant which by virtue of his previous membership he had necessarily acquired. It is this alleged contractual right and this alleged proprietary interest which are relied on as providing the appellant's right to seek relief in a Court of justice.

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For the reasons I have mentioned I do not consider it necessary to give any decision on this point, and I pass at once to what are the other issues in the case. Rule 21 of the rules and regulations, as they existed in March, 1917, is in these terms: "The committee shall on the first Monday in March proceed to re-elect members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on the 25th of March then instant." It is contended for the appellant that no grounds existed upon which the committee could lawfully deem him to be ineligible; and that in deciding as they did they were acting ultra vires and/or in an arbitrary and capricious manner, and/or in a way contrary to natural justice. The contention was framed in this alternative form in order to meet the particular view which the Court might take of the facts. Astbury J. took the view that the ground, and the only ground, on which the committee's decision was based was the fact that the appellant was of enemy birth. I find myself unable to agree with the views of the other members of this Court on this point. I agree with the view of the learned judge, though I prefer to say that it is the natural and necessary inference from the facts rather than that there is any direct evidence upon the point. The grounds upon which I arrive at this conclusion are as follows. On November 6, 1916, a deputation of the Stock Exchange Anti-German Union had attended before the committee of the Stock Exchange and had pressed their view for the exclusion of the large majority of members of alien enemy birth. As a result of this interview and of what had occurred previous to the election in March of 1916, the committee were no doubt aware of the objections which would be made to the re-election of members of enemy birth at the election in March of 1917. In the month of February, 1917. the committee took up the question of what their procedure should be in the event of objection being given under rule 35. At the meeting of the committee held on February 5, 1917, a draft, which was headed "Draft Procedure on Re-election" was read and ordered to be circulated to the committee. At a meeting of the committee held on February 7 the draft was with certain unimportant alterations adopted. On the same day a general objection to the re-election of every member of the Stock Exchange of alien enemy birth was lodged by Mr. Gilbert Johnstone, the chairman, on

behalf of the Committee of the Stock Exchange Anti-German Union. On February 15 the appellant sent in his application to the committee for re-election, and on the same day the secretary of the committee, in accordance with the procedure which the committee had adopted, sent the appellant a letter dated the same day informing him that notice of objection under rule 35 had been lodged with the committee on the ground of his enemy birth. The draft letter submitted to the committee on February 5 as part of the procedure on re-election to be adopted contained three grounds of possible objection—namely, birth, origin, connection. The letter was no doubt drafted in this form in anticipation of the form which the objection when lodged might or could take. The draft letter as adopted was printed, and the secretary, in sending the letter to the appellant, struck out the words "origin" and "connection" in order to make the letter correspond with the general notice of objection, which was the only one which he had received up to that date. In doing this the secretary was acting in a purely ministerial capacity, and no weight can in my opinion be given to the fact that the words "origin" and "connection" were struck out. The objection as made was to birth alone, and that was the only objection of which the committee had any notice. I cannot bring myself to believe that any body of honourable men occupying a like position to that occupied by the members of the committee of the Stock Exchange, having given a member notice that a particular objection had been made to his re-election, and having invited him both by letter and at an interview to deal with that objection and that objection only, would, without calling his attention to it and asking him for an explanation, proceed to refuse his application upon some ground other than, or in addition to, the one which they had led him to believe was the only one he had to meet. I cannot think that the committee of the Stock Exchange would so act. As a matter of tactics it may be judicious for the defendants' counsel to refuse to give any intimation as to the ground upon which the committee in fact acted, and to suggest that it was quite open to them to take other matters into consideration. I feel convinced that the committee must wish, having regard to their action, that this case should be decided upon the question whether their action can be justified upon the assumption that they did act upon the

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ground of enemy birth alone. I am quite prepared to so decide it. For the reasons which I have already given I should be prepared to agree with the learned judge's view of the fact on this point. There is, however, further material upon which to support this conclusion. The procedure on re-election which the committee laid down for themselves, and to which I have already referred, is to my mind almost conclusive upon this point. It seems to indicate plainly that the committee intended their procedure and their deliberations to be confined to the particular objection made under rule 35 and to that alone.

On this view of the facts it is unnecessary to consider what is the true effect of rule 35, and whether, as contended for by Mr. Tomlin, it limits the jurisdiction of the committee to an inquiry into an objection made in pursuance of the rule.

This view of the facts disposes also of the objection that the action of the committee was against natural justice.

I pass on now to consider counsel's contention that the action of the committee was arbitrary and capricious to an extent which would justify interference by a Court of justice. His argument, as I understood it, was that the committee had not acted upon their own better judgment, but had allowed themselves to be coerced into doing something of which they really disapproved. I could have understood the argument had it led up to the conclusion that the committee had acted from the collateral motive of securing their own re-election. This contention was expressly disavowed by counsel for the appellant, and as put I entirely fail to see that the facts support the contention.

Upon the outbreak of war the Stock Exchange was closed. It was re-opened on January 4, 1915. The agitation for the exclusion of naturalized persons of enemy birth does not appear to have commenced until after the election held in March of that year. In preparation, however, for the election of March, 1916, the petition of November 10, 1915, was presented to the committee. The reply to that petition is dated January 26 of the following year, and quite clearly indicates the views and policy of the then committee. The letter indicates that the warning to persons of German or Austrian birth to keep away from the House for the present had been repeated, but that the committee were not prepared to refuse

re-election to all naturalized members of enemy birth, but that if objections to individuals were made they would be duly taken into consideration. On March 9, 1916, a meeting of members of the Stock Exchange was held at which 485 members were said to have been present, of whom 408 voted in favour of a resolution in these terms: "That this meeting agrees to oppose the re-election of all persons of alien enemy birth who were elected subsequent to March, 1895, with the exception of those who are serving or have sons serving in the Imperial forces." This resolution was communicated to the committee, who replied to it on the following day. They in substance repeated what they had said in their reply to the first petition. They added that the committee were not prepared to submit the House to a dislocation of business, and certain of its members to individual hardship, which the adoption of the policy advocated at the meeting would entail, and that for the reasons given the committee felt bound to proceed with the reconsideration of the re-election of those members, as they are required to do under rule 21. As a result, apparently, of the attitude taken up by the committee, six members proposed by the Anti-German Union which had by that time been formed were put up for election on the committee and were elected. Sixteen members of alien enemy birth failed to secure re-election, but of these eleven were subsequently re-elected. It is natural to assume that the six new members of the committee would endeavour to secure some measure of approval of the policy which they were elected to support. The members of the Anti-German Union were certainly determined to press their views, and they asked for an interview with the committee, which took place on November 6. At that interview Mr. Gilbert Johnstone, the chairman of the union, addressed the committee, and stated that the policy they wanted to see adopted was the exclusion of all members of enemy birth, that they did not want to drag the question before the public, but considered it their duty to the country to leave no stone unturned to obtain the exclusion of all but a few who might be specially exempted. The committee did not commit themselves to any expression of opinion in reply, though, apparently, they did on the same day as the interview took place pass a new rule which provided that a broker might not share commission with a former

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member who had applied for re-election and had been rejected. In January of the following year the committee made an alteration of rule 10 which rendered the confirmation of a resolution of the committee relating to the re-election of members unnecessary. Down to this point I cannot see that the committee, although they had apparently to some extent yielded to the pressure put upon them, had done so for any other reason than that they considered it their duty, in the best interests of the Stock Exchange, to do so. I find nothing in the critical events of the election which followed in March to alter this impression. The committee insisted upon individual objection, if objection was going to be made, and when the objections were sent in they apparently considered each one strictly in accordance with the procedure they had laid down. In the result fifty of those objected to were re-elected and fifty-seven rejected. The conclusion which I draw from these figures, and from the evidence and from a perusal of the committee's lists recording the result of the voting (which, though apparently not formally put in, were used at the trial), is that although the committee accepted the view that enemy birth alone was sufficient under existing circumstances to disqualify a member for re-election, yet almost any circumstances which could be accepted either as evidence of loyalty and good faith, or as likely to remove personal prejudices, were accepted as grounds for relaxing the strict severity of the rule. The grounds upon which this dispensing power was exercised may be criticized as being arbitrary and capricious, but that is of no assistance where the complaint is that the action of the committee in rejecting the appellant was arbitrary and capricious.

This conclusion brings me to a consideration of what is really the important question in this case. Counsel for the appellant went so far as to contend that to exclude a member on the ground of enemy birth alone is an ultra vires act. He treated birth as a mere geographical accident, and asserted that the committee had no more right to refuse to re-elect a naturalized member merely on the ground that he was born in Germany than they would have to refuse to re-elect a member merely on the ground that he was born either in England or Scotland or Ireland or Wales. This argument appears to me to lose sight altogether of the fact that

eligibility is a relative fact, and that the personal qualities and the position and circumstances of the member seeking re-election are not the only things to be taken into account, but the constitution and privileges of the Stock Exchange, and any relevant circumstances arising out of the conditions of the moment are just as important, and have also to be taken into consideration.

The attitude of this country towards persons of foreign birth resident here, whether naturalized or not, has always been notoriously tolerant. The outbreak of this terrible war and the atrocious methods which are indulged in by our enemies have necessarily brought about a great change of feeling, and it is more than can be expected of human nature to suppose that every one will, under all circumstances, be capable of complete self-restraint when brought into close communication with persons of enemy birth. It is quite clear that the committee of the Stock Exchange realized this at an early stage, and continued to realize it. Hence their warnings to members of enemy birth to keep away from the House given originally in May, 1915, and repeated in the following January. The reasonableness of this warning does not appear to have been disputed by the appellant, nor does he dispute that the disregard of the notice by members resulted in violence and disorder in the House. Under these circumstances the committee of the Stock Exchange were placed, as it appears to me, in a difficult and anxious position. A very considerable body of members, led by an influential and respected member of the House, were pressing upon the committee the need for stronger measures. The position and privileges of membership of the Stock Exchange are such that if abused in time of war they justified the contention of the objectors that membership by persons of alien enemy birth constituted a national danger. The disorderly scenes which had marked the presence of these persons in the House was a ground for the contention that their presence was contrary to the interests of the Stock Exchange. It may be that the danger was exaggerated. It is possible to contend that the remedy for disorder was disciplinary action against those who were unable to restrain their feelings. This surely is not sufficient. Given the possibility of national danger and the possibility of disorder arising as a possible consequence of the enemy birth of members, can it be said that

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enemy birth is not of itself a matter upon which a body like the committee of the Stock Exchange, acting honestly and in good faith, may legitimately deem a ground of ineligibility for membership? I think not. It is impossible not to regret any individual hardship which may result from such a decision. Individual hardship alone will not enable a Court of justice to interfere.

For these reasons, in my opinion the appeal fails.

EVE J. I do not propose to occupy further time in recapitulating the facts, or in expressing in any detail the reasons for which I agree that this appeal cannot succeed.

The fact that fifty out of the 107 members to whose re-election the same objection of alien enemy birth had been raised under rule 35 were in fact re-elected negatives, in my opinion, the conclusion at which the learned judge arrived, that such objection was the only ground on which the committee's decision was based. Undoubtedly it was a potent, perhaps the most potent, factor in bringing about that decision, but in my opinion there is not only no evidence from which it is legitimate to conclude there were no other grounds, but the result of the election is strong evidence that there were other grounds, and that the committee did not act solely on the objection common to all the 107 candidates.

But even if it were true that the committee acted solely on that objection, I still think the plaintiff would have no cause of action unless he could prove that they acted from some improper motive or arbitrarily and capriciously. He does not allege improper motive, and the evidence, which discloses careful discrimination between individuals against whom the same objection had been made, negatives an arbitrary or capricious attitude. In my opinion, according to the true construction of the deed of settlement and the rules, the question of determining the eligibility or non-eligibility of those who are to have the right of entry into the Stock Exchange from year to year is vested in the committee as a board of management acting on behalf of the owners of the building and premises, and if there is no corrupt or arbitrary conduct between the committee and the person who is seeking, either by election or re-election, to obtain that right of entry, the Court has no jurisdiction to sit on appeal from the deliberate decision of the committee.

The retiring member has no proprietary rights. In this he stands in no better position than a candidate does, and, indeed, the only distinction between individuals applying respectively for election and re-election in this respect is this, that the latter, having already had the entry in previous years, may perhaps not unreasonably expect to obtain the renewal of the privilege with more confidence than the former can look for the first grant of it. But in all respects they are, in my opinion, alike subjected to the discretionary power of selection vested in the committee.

For these reasons, I am of opinion that the action cannot be maintained, and that this appeal fails.

It only remains to be added that, had the Court arrived at a different conclusion, it would have been impossible to give the plaintiff the relief he claims in paragraphs 5, 6, and 7 of his prayer. The most the Court could have done would have been to refer the matter of his request for re-election back to the committee for further consideration.

Appeal dismissed.

Solicitors: *Herbert Smith, Goss, King & Gregory; Travers-Smith, Braithwaite & Co.*

G. A. S.

NEVILLE J. *In re* AMERICAN PIONEER LEATHER COMPANY, LIMITED.

1918

March 19.

[0030 of 1918.]

Company—Winding up—Private Company—Deadlock—Article providing for Winding up in case of Non-purchase of Shares by other Members—"Just and equitable"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 129 (*vi.*).

A private company consisted of three shareholders only; they were the original allottees and held all the issued shares, which were fully paid, in equal proportions. Of these three one was resident in America and the two others were the present directors of the company. Owing to dissensions between them the affairs of the company were now at a deadlock, and there were pending actions between the shareholders and the company. The articles of association provided that a shareholder desirous of withdrawing from the company should offer his shares to the others, and in the event of neither of them purchasing the same the shareholder desirous of withdrawing should be entitled to have the company wound up. One of the directors offered his shares pursuant to this clause to the two other shareholders respectively, but neither of them purchased them. He now presented this petition for the compulsory winding up of the company. The petition was opposed by the two other shareholders. The company had sufficient assets to realize a considerable sum for the shareholders in a winding up:—

Held, that in the circumstances it was just and equitable that the company should be wound up by the Court.

This was a shareholder's petition for the compulsory winding up of the company presented by Frederick Draeger.

The company was incorporated in 1916 as a private company under the Companies Acts, 1908 and 1913, for the purpose of carrying on the business of wholesale and export leather merchants with a capital of 10,000*l.* divided into 10,000 shares of 1*l.* each, of which 6003 shares had been issued. There were three shareholders only, Draeger, Lubin, and Nickelsburg, each of whom held 2001 fully-paid shares. They were also the first directors of the company, but in November, 1916, Nickelsburg went to America, where he remained, and in May, 1917, he resigned his office of director, since which date Draeger and Lubin were the only directors, Draeger being the chairman. Lubin held a power of attorney and a proxy from Nickelsburg in respect of the shares held by him.

The articles of association of the company (which excluded the regulations in Table A) provided as follows :—

Article 2 (*c*) : "The directors may at any time in their absolute and uncontrolled discretion and without assigning any reason therefor, decline to register any proposed transfer of shares."

Article 4 : "In the event of either of the shareholders whose holding shall be upwards of 2000 shares of 1*l.* each at any time after the allotment to them or either of them of the said shares (and without assigning any reason therefor) being desirous of giving up his her or their holding and withdrawing from the company the person so withdrawing shall offer to the other of them the said shareholders his said share or holding, and the remaining persons and/or either of them shall have the option of purchasing the same at the value of the said shares within the period of thirty days from notice in writing to be given by the person so withdrawing to the other of them, and in the event of neither of the latter persons purchasing the said share or holding, or in the event of any dispute as to the value of the said share or holding of the persons so withdrawing, the one giving such notice shall be entitled to have the company wound up, and the remaining or other shareholders shall consent to and shall do all acts and things as may be necessary for the passing of any requisite resolution for such winding up or consent to an order for that purpose should a petition for such winding up be presented by the person so withdrawing as aforesaid."

Article 28 provided that two members personally present and entitled to vote should be a quorum for a general meeting, and article 29 provided that the chairman of the directors should be entitled to take the chair at every general meeting.

Article 31 : "Every question submitted to a meeting shall be decided in the first instance by a show of hands and in the case of an equality of votes the chairman shall both on the show of hands and at the poll have a casting vote in addition to the vote or votes to which he may be entitled as a member."

Article 41 provided that the number of directors should not be less than two nor more than three, and article 47 provided that the directors might determine the quorum necessary for the transaction

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of business, but that until otherwise determined two directors should form a quorum, and that a director might, and the secretary at the request of a director should, convene a meeting of the directors, and that questions arising at any meeting should be decided by a majority of votes, and in case of equality of votes that the chairman should have a second or casting vote.

In October, 1917, dissensions arose between Draeger and Lubin, and on October 25, 1917, Draeger, being desirous of withdrawing from the company, offered his shares for sale to Lubin and Nickelsburg respectively pursuant to clause 4 of the articles, but neither of them purchased them.

Draeger alleged that Lubin refused to attend at any board meeting, so that it became impossible to carry on the business of the company, and that with the object of enabling the business to be carried on he, Draeger, purported on November 9, 1917, to approve a transfer by him of one of his shares to one Martin, and thereafter, with his concurrence, convened an extraordinary meeting of the company at which Martin was appointed as an additional director. Lubin thereupon brought an action against Draeger, Martin, and the company (*Lubin* v. *Draeger* [1918 L. 13]), in which on February 8, 1918, Younger J. granted an interim injunction restraining Draeger until the trial of the action or until further order from interfering with Lubin acting as a director of the company, and from excluding him from access to the minute-book and other documents of the company, and restraining Martin from acting as a director of the company. This action, in which Lubin claimed a declaration that Martin was not a member of the company and rectification of the register, was still pending. There was also another pending action by Nickelsburg against Draeger and the company claiming a declaration that Draeger had misapplied certain moneys of the company. Two other actions against the company were also pending, one by an American corporation, of which Nickelsburg was stated to be vice-president, for balance of account for goods, and the other by Lubin and Nickelsburg for rent.

Under these circumstances Draeger alleged by his petition that on the refusal of Lubin and Nickelsburg to purchase his shares under article 4 he became entitled to have the company wound up.

He further alleged that a deadlock had arisen in the affairs of the company, Lubin having refused to attend any board meeting, so that there could be no quorum of directors, and, further, that if Nickelsburg authorized Lubin to act as his proxy at any general meeting, it would be impossible, in the face of opposition, to pass any effective resolution for winding up the company or to alter the articles thereof. He further alleged that the company had assets of sufficient value after payment of creditors to realize a considerable sum for the shareholders, and that it was just and equitable that the company should be wound up.

There was considerable conflict of evidence, each director laying the blame on the other, and Lubin, amongst other things, deposed that so far as there was any deadlock it was of a temporary character, and that he had sold thirty of his shares to unimpeachable transferees and that the transfers had already been lodged for registration. He further deposed that he was ready and willing to pass any transfer of shares executed by Draeger provided that there was no personal objection to the proposed transferee, and provided that Draeger was willing on his part to pass transfers of shares executed by him, Lubin, in which case there would be no longer any difficulty in obtaining a quorum at general meetings.

Jenkins, *K.C.*, and *Shewell Cooper*, for the petitioner. It is "just and equitable," within the meaning of the Companies (Consolidation) Act, 1908, s. 129 (vi.), that this company should be wound up. There is a complete deadlock in the conduct of the business of the company, which in the case of a partnership would clearly be grounds for a dissolution, and the same principle applies in the case of a private company such as this, which is in substance a partnership. The decision of the Court of Appeal in *In re Yenidje Tobacco Co.* (1) is directly in point. The present case is even stronger in favour of a winding up order having regard to article 4 of the articles of association. We do not suggest that that article is binding in the sense of compelling the shareholders to submit to an order, but it is a material provision in considering whether it is just and equitable that the company should be wound up. The pending actions afford no reason for refusing the order asked

(1) [1916] 2 Ch. 426.

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for, but rather the contrary. The liquidator will employ his own solicitor, and not the solicitor of the petitioner: Companies (Consolidation) Act, 1908, s. 151.

W. A. Jolly (*Tomlin, K.C.*, with him), for the company and the two other shareholders. The petition is opposed by both the other shareholders, and no sufficient grounds have been shown to bring the case within the "just and equitable" clause. So far as the petitioner relies on the alleged deadlock, this is of a temporary character, and will be removed by the registration of the transfers of shares already lodged or by rectification of the register: *In re Furriers' Alliance* (1); *In re Copal Varnish Co.* (2) The present case is distinguishable from *In re Yenidje Tobacco Co.* (3), since in that case the petitioner was the innocent party, whereas in the present case the cause of the dissensions lay with the petitioner himself, and it is not open to a partner to take advantage of his own wrong and claim a dissolution of the partnership on that ground: Lindley on Partnership, 8th ed. p. 658; Partnership Act, 1890, s. 35. So far as the petitioner relies on article 4 of the articles of association, that article is in no way binding on the Court. The effect of that article may be, in the event named, to enable the company to pass an ordinary resolution for voluntary liquidation within sub-s. 1 of s. 182 of the Companies (Consolidation) Act, 1908, instead of proceeding by special resolution under sub-s. 2 of the same section, but it has no bearing on s. 129, which defines the circumstances under which a company may be wound up by the Court. There appears to be no direct authority upon such an article as article 4, but in the converse case it has been held that an article excluding or limiting the statutory right of a contributory to present a winding up petition is invalid: *In re Peveril Gold Mines* (4); and the two cases are analogous. Further, it would be inequitable that an order should be made on the petition of Draeger, who is a defendant in the pending actions, since the petitioner's solicitor, whether he is actually employed by the liquidator or not, has considerable influence over the proceedings in the winding up.

No reply was called for.

(1) (1906) 51 Sol. J. 172.
(2) [1917] 2 Ch. 349.
(3) [1916] 2 Ch. 426.
(4) [1898] 1 Ch. 122.

NEVILLE J. In this case a private company was formed by and between three persons who each held 2001 shares, being one third of the total issued capital of 6003 shares. They were originally all three appointed directors, but one left the country and retired, whereupon the two present directors became the controlling authority of the company. They shortly quarrelled between themselves and now have little to say to one another, and difficulties have arisen naturally and inevitably in carrying on the business of the company, and things have apparently reached a position of complete deadlock, and I do not see how that can be overcome except by the possible intervention at a future date of the third shareholder, who seems to be now taking sides against the petitioner. Such a contingency was foreseen when the articles of association of this company were framed and the parties arranged to provide against such a contingency, and in order to meet the case of any two combining against the third the articles provided that the two should, on proper notice being given, take over the interest in the company of the third, or if that was not done, then that the company should come to an end. The petitioner was anxious that the other two shareholders should buy him out, and under that article gave notice to the two other shareholders to buy his interest in the company; but they have refused to do so, and therefore, according to the terms of that article, a winding up order would follow as a matter of course. It is not suggested, however, that this article is in any way binding on the Court, but the question is whether the existence of such a provision is a circumstance to be taken into consideration in deciding whether it is just and equitable within s. 129 of the Companies (Consolidation) Act, 1908, that the Court should order the company to be wound up; and it seems to me that, although the partners have no power by articles of association to determine the time and circumstances under which a private company shall be put an end to, still the fact that they have endeavoured to protect themselves in this way in the event of two of the shareholders differing from the other may be and ought to be taken into consideration by the Court in determining whether it would be just and equitable to make a winding up order; and, having regard to the position into which the affairs of this company have drifted and the intention of the

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shareholders from the first that in such circumstances the shareholder who was left in the cold should be entitled to put an end to the company, it seems to me only just and equitable to make an order for the compulsory winding up of this company. The only doubt which I have felt arises from the fact that there are certain actions pending, and I should be sorry to make any order which would prevent the thorough investigation which would take place on the hearing of these actions as to the obligations and liabilities of the directors towards the company; but the question whether these actions should be allowed to proceed and as to the attitude which the company should adopt is one for the liquidator to consider and will not be in any way prejudiced by the order which I propose to make, and accordingly I make an order for the compulsory winding up of this company.

Solicitors: *Oswald Bird; Ralph Raphael.*

A. C.

Distinguished. Re MANNERS (*decd.*). [1949] 2 All E.R. 201.

ASTBURY J. 1918 *March* 20, 21.

Distinguished. Re MANNERS. [1949] 1 Ch. 613

In re HALL. HOPE *v.* HALL.

[1917 H. 1177.]

Will—Satisfaction—Performance—Covenant that Executors should pay contingent variable Annuity—Bequest to Annuitant of Residuary Income in fact greater than actual Maximum Annuity—Direction to pay Debts and Legacies.

By an antenuptial settlement dated April 29, 1891, the husband settled certain property on the usual husband's fund trusts, and covenanted with the trustees that if his wife survived him his executors would yearly during her life pay the trustees a sum sufficient to make the income up to 1000*l.* less income tax.

By his will, dated January 20, 1894, the husband devised and bequeathed his residuary real and personal estate to his executors and trustees upon trust for sale and conversion, and directed them thereout to pay (inter alia) his debts and legacies and to invest his "clear residuary estate" and hold the same in trust to pay the income to his wife for life, and after her decease (in the events that happened) in trust for a certain remainderman.

The husband died on November 30, 1894, without issue. The wife thenceforth received the residuary income, which, together

with the settlement income, had always amounted to over 1000*l.* a year less income tax :—

Held—(1.) The covenant had hitherto in fact been performed by the bequest : *Goldsmid* v. *Goldsmid* (1818) 1 Swanst. 211 applied. (2.) (*a*) The direction to pay debts did not include the prospective liability under the covenant. (*b*) The husband intended the bequest in satisfaction of that liability.

ORIGINATING SUMMONS.

By an antenuptial settlement dated April 29, 1891, and made between the husband of the first part, the wife of the second part, and the settlement trustees of the third part, certain funds called the husband's trust funds were settled upon successive trusts for the husband for life, the wife for life, and thereafter (in default of issue, which happened) for the husband absolutely.

By clause 7 the husband covenanted with the settlement trustees that, in case the wife survived him, his executors or administrators should from time to time yearly, and in each year from and after his decease and during the remainder of her life, pay to the settlement trustees such a sum as with the income arising in each such year from the husband's trust funds would make up the full sum of 1000*l.* in each such year less income tax. The settlement trustees were to stand possessed of the moneys received by them under this covenant upon the trusts of the income of the husband's trust funds.

By his will, dated January 20, 1894, the husband, after appointing executors and trustees thereof and making certain pecuniary and specific bequests, bequeathed the copyright in certain books to the will trustees upon trust to pay the annual profits to the persons for the time being entitled to his residuary estate. He devised and bequeathed his residuary real and personal estate to the will trustees upon trust for sale and conversion, and directed them thereout to pay all his debts, general (*sic*) and testamentary expenses, legacies, and certain legacy duties, and to invest his " clear residuary estate " in the investments therein authorized, and to stand possessed thereof, in trust to pay the income to his wife for life, and after her decease in trust to pay a life annuity of 500*l.* to his cousin Juliana (who died on September 9, 1906, before her annuity became payable), and subject thereto upon trust to accumulate the income until the remainderman, Scott (the grandson of a first cousin, born April 17, 1884), attained the age of twenty-five, and from and after that date

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in trust for the remainderman if then living. The testator authorized his trustees to postpone the sale and conversion of his estate for such times as they should think fit, and declared that the whole of the rents, dividends, interest, and annual produce actually received from his unsold and unconverted real and personal estate should for all intents and purposes be considered as income and be paid and applied accordingly.

The husband died on November 30, 1894, without issue. The settlement income had varied roughly from 270*l.* to 360*l.*, but the husband's clear residuary estate had always produced over 900*l.* a year.

The will trustees, acting on the supposition that, so long as the residuary income bequeathed to the wife made up the settlement income to over 1000*l.* a year, the covenant was performed or satisfied by the bequest, paid the whole residuary income to the wife and kept their capital intact.

Early in 1917—i.e., about twenty-two years after the husband's death—the question was raised whether the bequest was in fact a performance or satisfaction of the covenant, or whether the instalments due under the covenant ought really to have been paid partly out of capital according to the rule in *In re Perkins* (1), in which case the wife, now aged sixty-one, would be entitled to recoupment of some 9000*l.* out of the capital of her husband's estate, and if she lived to a fair age would get the entire capital.

On July 12, 1917, the will trustees issued this summons to determine this and other points.

Fairfax Luxmoore, for the will trustees.

Hon. Frank Russell, K.C., *Bryan Farrer*, and *Nicholson Combe*, for the wife. There are three indications against satisfaction: first, the creditors are the settlement trustees, whereas the legatee is the wife; secondly, the legacy is a bequest of residuary income; thirdly,—and this is most important—the will contains a direction to pay debts and legacies: *In re Huish* (2); Theobald on Wills, 7th ed. pp. 764-776.

Micklem, K.C., and *H. M. Humphry*, for the remainderman. This is a case of performance, which is a question of fact, rather than

(1) [1907] 2 Ch. 596. (2) (1889) 43 Ch. D. 260.

satisfaction, which depends on intention. The settlement income has throughout been made up to over 1000*l.* a year. That is a clear performance: *Blandy* v. *Widmore* (1); *Lee* v. *D'Aranda* (2); *Garthshore* v. *Chalie* (3); *Goldsmid* v. *Goldsmid.* (4)

[ASTBURY J. The first three were intestacy cases, the fourth a quasi-intestacy. It has been held that intestacy is not a performance of a covenant to leave an annuity: *Couch* v. *Stratton* (5); Theobald on Wills, 7th ed. p. 72.]

The share under the intestacy was a lump sum. But here the wife is given de anno in annum an income greater than the promised annuity. Surely that is a performance.

If it is necessary to rely on satisfaction, the following considerations support it:—First, the gift of the residuary income was clearly greater than the contingent liability under the covenant. Secondly, no time of payment of the residuary income was fixed by the will: *In re Horlock* (6); *In re Rattenberry.* (7) Thirdly, the settlement trustees never became creditors of the husband or his estate: *In re Hargreaves.* (8) Fourthly, on the language of this will, the direction to pay debts does not apply to the contingent future liability under the covenant: compare *Wathen* v. *Smith* (9), though this decision has been impugned in subsequent cases.

Hon. Frank Russell, K.C., in reply. A direction to pay debts negatives satisfaction: *Chichester* v. *Coventry* (10); and, *pace Wathen* v. *Smith* (9), this covenant created a debt within the direction to pay: *Hales* v. *Darell* (11); *Cole* v. *Willard* (12); *Atkinson* v. *Littlewood.* (13) The present case is really covered by *In re Poyser.* (14) Though unreported, the effect of the decision is shortly stated in the report of the same case at a subsequent stage. (15)

Micklem, K.C., in rejoinder. It is very dangerous to rely on an unreported decision. There may have been something in the

(1) (1716) 1 P. Wms. 324; 2 Wh. & T. L. C., 8th ed. 413.
(2) (1746) 1 Ves. Sen. 1; 3 Atk. 419.
(3) (1804) 10 Ves. 1.
(4) 1 Swanst. 211.
(5) (1799) 4 Ves. 391.
(6) [1895] 1 Ch. 516.
(7) [1906] 1 Ch. 667.
(8) (1890) 44 Ch. D. 236.
(9) (1819) 4 Madd. 325.
(10) (1867) L. R. 2 H. L. 71.
(11) (1840) 3 Beav. 324.
(12) (1858) 25 Beav. 568, 572.
(13) (1874) L. R. 18 Eq. 595, 605.
(14) Warrington J., May 6, 1908 (unreported).
(15) [1910] 2 Ch. 444, 445.

ASTBURY J. will or settlement in that case which made the point absolutely clear.

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ASTBURY J. (after stating the facts). The question is whether the husband's covenant in his marriage settlement ought at his death to have been treated as creating a debt within the meaning of the direction to pay debts contained in his will.

A large number of authorities have properly been cited, but the real question, quite independent of authority, is what is the true meaning and construction of the husband's will, which I am told was drafted by himself.

The covenant in the settlement is that his executors or administrators should from time to time yearly and in each year from and after his decease during the remainder of his wife's life pay to her through the medium of the settlement trustees such a sum year by year as would with the income arising from the settled fund make up in each year the sum of 1000*l*. There was no direct debt under this covenant at all at the husband's death, but after the end of the first current year his estate became liable, apart from the direction to pay debts contained in his will, to make up such sum as at the end of that current year would bring up the settlement income to 1000*l*.

Now the husband devised and bequeathed his residuary estate to his will trustees upon trust for sale and conversion, and directed them thereout to pay his debts, funeral and testamentary expenses, legacies and certain legacy duties, and to invest his "clear residuary estate" and to pay the income thereof to his wife for life. I cannot think that he had the slightest intention, having regard to the language of these two documents, that there should be an estimation of a future indebtedness which should be capitalized and paid out of his estate prior to the ascertainment of his "clear residuary estate" in accordance with his directions. If he meant that his debts in the ordinary sense of the term should be paid, that could be done within a reasonable period from his death and the "clear residuary estate" invested prior to the time when the amount to make up the 1000*l*. for the first current year would have to be ascertained.

The real question here is whether the direction to pay the income of the "clear residuary estate" to his wife—it is quite true

it is not through the medium of the trustees, but to her direct— ought to be regarded in the events that have happened, there being ample money for the purpose, as a performance in fact of the covenant entered into three years before his will.

The doctrine of satisfaction, strictly so called, as distinct from performance applies to a legacy to a creditor, in which case the legacy, if of equal or greater amount, is prima facie considered to be a satisfaction of the debt. This general rule has often been disapproved, but it is a binding rule upon the Court to-day. A number of circumstances as artificial as the rule itself have from time to time been regarded as excluding the operation of the rule, but excluding it only by affording indication of intention to the contrary.

The three indications of this character relied upon by the wife are, first, that the liability under the covenant is to pay certain variable sums to the settlement trustees, whereas the direction under the will is to pay the income to the wife direct. This difference in the personality of the payee has been held in certain cases to be a circumstance to be taken into consideration in judging of intention, but alone it has frequently been said not to be decisive.

The next indication relied upon is that as a rule a gift, not of a pecuniary legacy, but of a share of residue, will not be regarded as implying an intention to satisfy. For this purpose it is of vital importance to have regard to the character of the debt and to the character of the testamentary gift. This is not a debt in the ordinary sense of the word, namely, a particular sum owing by the husband during his lifetime and at his death, nor is there a capital gift of residue in which the question of satisfaction would not arise. What the husband has done is to covenant that from his estate there shall year by year be made up to his wife the sum of 1000*l*. By his will, presumably made with knowledge of the property he was able to dispose of, he directed that the whole residuary income should be paid to his wife. In my opinion that does not fall within the ordinary rule that the gift of a share of residue is not a satisfaction of an ordinary debt.

The third matter, and the one principally relied upon, is that this will contains a direction to pay debts. The presumption of satisfaction through a long series of authorities has been held to be rebutted by a direction to pay debts and legacies, and also by a

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direction to pay debts alone. If this covenant creates a debt within the meaning of that direction the wife's contention is right.

I must now refer to one or two authorities which have dealt with the question of performance as distinguished from satisfaction. It is quite true that in the majority of these cases the performance has arisen upon an intestacy.

In *Blandy* v. *Widmore* (1) by marriage articles the husband agreed that if his wife should survive him he would leave her 620*l.*, and he accordingly covenanted with the settlement trustees that his executors within three months after his decease should pay the wife 620*l.* if she survived him. The husband died intestate and without issue, whereupon the wife became entitled under the statute to a moiety of the personal estate, which exceeded 620*l.*, and the question was whether the distributive share of the wife should go in satisfaction or performance of the covenant. Cowper L.C. said: "I will take this covenant not to be broken, for the agreement is to leave the widow 620*l.* Now the intestate, in this case, has left his widow 620*l.* and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant."

In *Lee* v. *D'Aranda* (2), which was a similar case, the husband covenanted by marriage articles to leave his wife by deed or will 1000*l.* at his death if she should survive him. He died intestate, and the question was whether she was entitled to her distributive share and also to the 1000*l.* Lord Hardwicke decreed that if her share of the personal estate was of an equal value to or exceeded 1000*l.* it should be a satisfaction and she should not come in first as a creditor for that sum and then for a moiety of the surplus, and he relied upon the authority of *Blandy* v. *Widmore*. (3) He said: "When husbands create debts of this kind, the intention is, that she should have it without regarding the manner how; and the Court leans against double satisfactions."

In *Blandy* v. *Widmore* (3) there is a valuable note by the later editor, S. C. Cox, to the effect that *Blandy* v. *Widmore* (3) and *Lee* v.

(1) 1 P. Wms. 324; 2 Wh. & T. L. C., 8th ed. 413.

(2) 1 Ves. Sen. 1; 3 Atk. 419.

(3) 1 P. Wms. 324.

D'Aranda (1) had been considered rather as cases of actual performance than of satisfaction of covenants, and he says: "In the cases on the subject of satisfaction, in which the contracting party is supposed to have done some other thing in lieu of the thing contracted for, and which therefore depend more particularly on the implied intention of the party, several rules of presumption have been adopted which do not seem to apply to the cases of performance (vide *Eastwood* v. *Vinke* (2)). In cases of satisfaction the presumption will not hold where the thing substituted is less beneficial (either in amount, or certainty, or time of enjoyment, or otherwise) than the thing contracted for, since satisfaction implies the doing of something equivalent, and the presumption is so much weakened where the thing substituted is not equivalent to the thing contracted for, that a part satisfaction will not be intended, whereas in cases where the thing done can be considered as a part performance of the thing contracted for, it shall be so taken." This is as true to-day as in 1793 when it was written.

In *Goldsmid* v. *Goldsmid* (3), a husband having by marriage articles covenanted that if he died in his wife's lifetime his executors should within three months after his decease pay her 3000*l.*, and having by his will given all his property to his executors upon trust after payment of his debts at the expiration of three years from his decease to divide it as they thought right, and the executors having all died or renounced, and it being decided that his property could not therefore be distributed in accordance with the direction in the will, it was held that, notwithstanding the fact that he had died testate, the disposition of his estate must go as on intestacy. Sir Thomas Plumer M.R. held that the widow's distributive share on that footing exceeding 3000*l.* must be adjudged a performance of the covenant. Now in that case there was in fact a will, and there was in fact a direction that the testator's debts should be paid, and it was only the distribution of his estate involving the personal allocation by the executors that could not be carried out. Sir Thomas Plumer M.R., after referring to *Blandy* v. *Widmore* (4) and other cases, said (5): "The only question now is, Whether a distinction can be made

(1) 1 Ves. Sen. 1; 3 Atk. 419.
(2) (1731) 2 P. Wms. 613, 616.
(3) 1 Swanst. 211.
(4) 1 P. Wms. 324.
(5) 1 Swanst. 218.

ASTBURY J. in the present case, the widow taking her distributive share under not an absolute, but a quasi, intestacy; where the purpose of the testator being disappointed, a virtual intestacy ensues, and the statute is the guide of distribution. The principle of the decisions is most clearly explained in the able review of them by the Lord Chancellor in [*Garthshore* v. *Chalie* (1)] the last case on the subject. Admitting that it would originally have been extremely difficult to answer the argument of Serjeant Hooper, in *Blandy* v. *Widmore* (2), Lord Eldon says,—'Those cases are distinct authorities, that, where a husband covenants to leave, or to pay at his death, a sum of money to a person, who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive; and, consequently, when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is, that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains from the executor or administrator that sum, the Court is bound to consider that as a payment under the covenant. These" —marriage settlement cases with provisions for the wife—"are not cases of an ordinary debt: during the life of the husband, there is no breach of the covenant, no debt: the covenant is to pay after his death; and the inquiry is, not whether the payment of the distributive share is satisfaction, but, a question perfectly distinct, whether it is performance. An important distinction exists between satisfaction and performance. Satisfaction supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, Was the thing done intended as a substitute for the thing covenanted? a question entirely of intent: but with reference to performance, the question is, Has that identical act which the party contracted to do been done? What sum was the widow to receive; and when? If she has received the sum stipulated, and at the time stipulated, namely, on the death of her husband, from his assets, the

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(1) 10 Ves. 1, 13. (2) 1 P. Wms. 324.

contract is performed." Then the learned judge refers to two cases of testacy, *Haynes* v. *Mico* (1) and *Devese* v. *Pontet* (2), where satisfaction was held not to affect the case, and he says at the end of his judgment (3): "Those cases are not applicable to the present. They were cases of testacy, and the question arose on the effect of legacies given by the will to the widow, which prima facie importing bounty, admitted a presumption of an intention in the testator to augment the provision in the settlement, and not to satisfy or perform it."

There are, of course, an enormous number of these cases and authorities which it is quite impossible to discuss, but the question really comes down in each case to the real construction of the particular documents.

In the present case, having regard to the nature of the covenant and to the nature of the gift in the will, I think upon the true construction there is no ground for supposing or holding that the husband's intention in his residuary gift was bounty over and above the covenant in the sense contended for. He had covenanted that year by year after his death his wife should receive out of his estate such a sum as with the income of the settled fund should give her an income of 1000*l.* a year. He has provided under his will means by which for twenty-two years that obligation has been annually performed, and if one case can be taken as an authority for another with different documents, the judgment of Sir Thomas Plumer M.R. in *Goldsmid* v. *Goldsmid* (4) in substance and in truth applies to, and ought to be applied, to the present case.

In *Wathen* v. *Smith* (5) it was held or stated that a provision in a settlement was not a debt in the ordinary meaning of the term. That case depended upon its own circumstances, and the dicta or the decision to that effect, if a decision, has not since been followed in certain other cases which again turned upon the particular documents that the Court was dealing with. But on the question whether this covenant was a debt at the husband's death within the meaning of the direction in the will, *In re Hargreaves* (6) is relevant.

(1) (1781) 1 Bro. C. C. 129.
(2) (1785) 1 Cox, 188; Pr. Ch. 240, n.
(3) 1 Swanst. 221.
(4) 1 Swanst. 211, 218, 221.
(5) 4 Madd. 325, 331.
(6) 44 Ch. D. 236.

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Another inquiry that throws some light on the construction that ought to be placed upon the will in this case is whether the settlement trustees could at any time during the last twenty-two years have sued the husband's executors for any debt under the covenant. Had they done so the true answer would have been that the covenant had been performed throughout and that no debt actionable at the instance of the settlement trustees had yet arisen.

The wife relied on *In re Poyser*. (1) The particular decision is not reported, but it is shortly referred to in the report of the same case at a subsequent stage. (2) In that case the testator by a settlement on the marriage of one of his sons in 1900 covenanted with the settlement trustees that if the marriage took place he, his executors or administrators, would pay to the trustees during the joint lives of himself and his wife and the survivor of them, and so long as the son or his wife, or any of their issue, should be living, a yearly sum of 250*l*., and he further covenanted to pay the settlement trustees a capital sum of 10,000*l*. By his will made in the following year he bequeathed his residue to his will trustees upon trust for sale and conversion and directed them to pay his funeral and testamentary expenses and debts and legacies, and then he gave to this particular son two-fifteenths of his residue, with a provision that half of that amount should be settled upon trust for the son for life, with remainder over. The report states, without giving any of the circumstances, or whether the matter was opposed or not, that Warrington J. made an order declaring that the settlement trustees were entitled to receive the annuity of 250*l*. as well as the capital sum of 10,000*l*., and that the payment of that annuity ought for the purposes of the division of the estate to be treated as a debt payable out of the capital of the testator's estate. Now assuming that this was a contested decision, it does not necessarily govern the present case. The sole question in each case is one of intention. In *In re Poyser* (1) Warrington J. held on the true construction of the will, that there was no intention to satisfy.

In the present case I have a different will to construe. I can only apply my own views on a question of intention, and I personally feel no doubt whatever that the husband intended the bequest of

(1) Warrington J., May 6, 1908 (unreported).

(2) [1910] 2 Ch. 444, 445.

income to his wife to be in satisfaction of his liability to her under his covenant.

I therefore hold, first, that the liability under the covenant ought not to be regarded as a debt within the meaning of the direction to pay debts in the will, and, secondly, that there has been throughout a performance on the part of the husband's estate of all liability under the covenant.

There will consequently be a declaration that on the true construction of the husband's will, and in the events that have happened, his liability under the covenant has hitherto been wholly satisfied and performed by the bequest of his residuary income.

Solicitors: *Western & Sons; Busk, Mellor & Norris.*

NOTE.

N.B.—The reporter is indebted to Messrs. E. F. & H. Landon and their counsel for the following information as to the unreported decision in *In re Poyser*, which in fact raised several points.

It was heard and decided on March 31 and April 1, 1908. The order was drawn up on May 6, 1908, after the minutes were signed.

The testator covenanted that his executors or administrators would within twelve calendar months after the death of himself or his wife, whichever should last happen, pay the son's settlement trustees 10,000*l.*, with 3 per cent. interest from such death, to be held on the usual husband's fund trusts, with a proviso enabling the testator or his executors or administrators to pay it in advance.

On the construction of the settlement it was contended that the 250*l.* annuity payable during the joint lives of the testator and his wife and the 10,000*l.* payable after their deaths were substitutional provisions, so that if the 10,000*l.* were paid during the wife's life the annuity ceased. But Warrington J. held that the covenants were quite distinct and negatived this contention.

It was then contended that the 250*l.* annuity was satisfied quoad the son's life interest by the bequest of the share of residue settled on the son for life with power to appoint to his widow during widowhood, and subject thereto for his issue as he should by deed or will appoint, with the usual trusts in default of appointment.

But this contention was completely disposed of by clause 12 of the will, fully set out in [1908] 1 Ch. 829. This clause not only enumerated the specific sums, including the 10,000*l.* that were to be brought into account, but, in addition to this strong negative pregnant, expressly directed that no other advances or gifts should be accounted for.

On the construction of clause 12 Warrington J. held that the presumption of satisfaction of the 250*l.* annuity was clearly displaced.

G. R. A.

C. A.
1918
April 18.

In re SWAIN.
BRETT *v.* WARD.

[1917 S. 1595.]

Will—Construction—"Issue" taking "the mother's share"—Residuary Gift—Ambiguous substitutional Gift—Unambiguous Gift over—Principle of Construction.

APPEAL of H. V. Ward from the decision of Eve J. (1)

A. Grant, K.C., and *Owen Thompson*, for the appellant.

Maugham, K.C., and *J. G. Joseph*, for the respondents, the infant grandchildren of Nellie Ward.

Stafford Crossman, for the executors and trustees.

By consent the order of Eve J. was discharged upon terms which were sanctioned by the COURT (Swinfen Eady and Bankes L.JJ. and Neville J.) on behalf of the infants, subject to the production of an affidavit by their guardian ad litem that the compromise was for their benefit.

Solicitors: *Ashley, Tee & Sons; Patersons, Snow & Co., for K. & W. Daniel, Ramsgate; Mowll & Mowll, for Mowll & Mowll, Dover.*

(1) Ante, p. 399.

G. A. S.

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